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In The

Supreme Court of the United States

October Term, 1996

COUNTY OF NASSAU; Nassau County Executive; Nassau County Comptroller; Nassau County Board of Supervisors; Nassau County Civil Service Commission,

Petitioners,

vs.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO (AFSCME), et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1.

Whether it is proper to collapse the three disjunctive criteria established in *Christiansburg* for awarding attorney's fees to a prevailing Title VII defendant into a single standard of "frivolousness"?

2.

Whether section 113 of the Civil Rights Act of 1991, which allows a prevailing party to recover expert fees, may be applied in cases arising before its enactment?

PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed here appear in the caption of the case except for the following parties which are not listed on the caption of the case herein:

> Civil Service Employees Association, Inc., Region I/Local 1000, (CSEA); Rita Wallace, Rachel Braver, Dorothy Garage, Linda Kelly, and Lois Whitely on behalf of themselves and all others similarly situated.

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In The

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COUNTY OF NASSAU; Nassau County Executive; Nassau County Comptroller; Nassau County Board of Supervisors; Nassau County Civil Service Commission,

Petitioners,

vs.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO (AFSCME); Civil Service Employees Association, Inc., Region I/Local 1000, (CSEA); Rita Wallace, Rachel Braver, Dorothy Garage, Linda Kelly, and Lois Whitely on behalf of themselves and all others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION AND ORDERS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 96 F.3d 644 and is reprinted at Appendix A (A1) to this petition.

The unreported memorandum and order of the District Court for the Eastern District of New York, dated May 31, 1995, is reprinted at Appendix B (A26) to this petition.

The District Court's memorandum and order, dated June 24, 1993, is reported at 825 F.Supp. 468, and is reprinted at Appendix C (A37) to this petition.

The District Court's memorandum and order, dated August 24, 1992, is reported at 799 F.Supp. 1370, and is reprinted at Appendix D (A55) to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on September 26, 1996 and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 706(k) of the Civil Rights Act of 1964, Title 42, United States Code, Section 2000e-5(k).

> *Attorney's fee; liability of Commission and United States for costs*
>
> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT OF THE CASE

Respondents ("AFSCME") commenced this class action suit in 1984 pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and the Equal Pay Act of 1963, 29 U.S.C. § 206(d), challenging petitioners Nassau County, New York's ("Nassau County") compensation system for municipal employees. Specifically, AFSCME claimed under theories of disparate treatment and disparate impact that Nassau County discriminated on the basis of gender by paying historically female-dominated job classifications less than historically male-dominated job classifications which required an equivalent or lesser composite of skill, effort, responsibility and working conditions.

In 1985, the district court partially granted Nassau County's motion to dismiss by rejecting AFSCME's Title VII disparate impact theory and dismissing the claims of certain individual plaintiffs. *See AFSCME v. Nassau County*, 609 F.Supp. 695, 708-12 (E.D.N.Y. 1985). Thus, to prevail on their disparate treatment theory, AFSCME assumed the burden of establishing that Nassau County intentionally discriminated against its female employees.

In 1987, the district court certified a class of approximately 6,000 female incumbent employees. *See AFSCME v. Nassau County*, 664 F.Supp. 64 (E.D.N.Y. 1987). Nassau County, a populous suburban county, employed over 19,000 people in approximately 1,500 job titles. AFSCME's challenge to Nassau County's compensation system reached back in time to 1967 and created a potential liability of several hundred million dollars.

Despite exhaustive discovery over four years, AFSCME could not offer any direct evidence of intentional discrimination at trial. *See AFSCME v. County of Nassau*, 799 F.Supp. 1370, 1379 (E.D.N.Y. 1992) (A76). Instead, AFSCME relied on the statistical analyses of two experts who testified to the existence of a gender-based wage differential in Nassau County job titles that they attributed to intentional discrimination. The district court categorically rejected their conclusion. Branding AFSCME's experts as "partisans" who sacrificed "objectivity and schc larship . . . to the need to prevail", 799 F.Supp. at 1417 (A169), the district court found their testimony lacking any probative value and dismissed nearly all of AFSCME's claims. The only exception to this resounding defeat was the district court's ruling in favor of a handful of women who held the job title of police detention aide. They were awarded a cumulative total of approximately $1.2 million in back pay over a fourteen year period.

After the decision, Nassau County moved for an award of $982,407.23 in attorney's fees and $550,974.66 in expert witness fees under the standard for prevailing defendants established in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). In 1993, the district court granted Nassau County's motion for attorney's fees, but deferred ruling on expert fees. *See AFSCME v. County of Nassau*, 825 F.Supp. 468 (E.D.N.Y. 1993) (A37). Since Nassau County's entitlement to expert fees turned on whether section 113 of the Civil Rights Act of 1991 could be applied retroactively, the district court opted to await this Court's decision in *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994), before deciding the matter. In 1995, the district court granted Nassau County's

motion for expert fees in light of the principles articulated in *Landgraf*. (A26).

By opinion dated September 26, 1996, the court of appeals reversed the judgments of the district court awarding attorney's fees and expert fees. *See AFSCME v. County of Nassau*, 96 F.3d 644 (2d Cir. 1996) (A1).

REASONS WHY THIS WRIT SHOULD BE GRANTED

I.

The court of appeals' opinion collapses the three disjunctive criteria established in *Christiansburg* for awarding attorney's fees to a prevailing Title VII defendant by merging them into a rigorous, blanket inquiry: Was the plaintiff's claim entirely frivolous?

AFSCME, a major union and dominant force on the American labor scene, committed seemingly unlimited financial resources to the prosecution of this action with the objective of sacking Nassau County for hundreds of millions of dollars. However, AFSCME's sweeping but unfocused plan to achieve financial awards for thousands of Nassau County employees was doomed to failure before the trial began.

In his opening statement, AFSCME's counsel promised that Dr. Stephan Michelson would provide compelling expert testimony and a regression model establishing intentional discrimination. *See* 799 F.Supp at 1395 (A116). Dr. Michelson, an economist and AFSCME's first witness, immodestly characterized his work as "the most exacting

model of a salary system, using the most error-free data set, ever presented in litigation." 799 F.Supp. at 1396 (A117). AFSCME, which paid Dr. Michelson more than $850,000 and whose experienced counsel displayed an "exquisite grasp" of Dr. Michelson's analyses, *see* 825 F.Supp. at 473 (A49), necessarily knew that his bold promise was an empty threat. By the end of the second day of trial on November 28, 1989, all of the participants knew it too.

In a "deft and sophisticated analysis", 96 F.3d at 652 (A22), the district court noted the many substantive deficiencies in Dr. Michelson's testimony that nullified his conclusions, including the following examples:

- "[A]lthough Dr. Michelson was aware of the critical role that the collective bargaining process has had in the Nassau County compensation system, he did not undertake even a brief investigation of it, and he deliberately omitted the results of that process from his study because he did not 'know how to measure it as a variable.'" 799 F.Supp. at 1400 (A129).

- Dr. Michelson selectively ignored the working conditions of jobs. "Thus, Dr. Michelson coded the job specification for the title of Morgue Attendant I with the variables that captured these factors: 'Graduation from high school', 'use of electric saw', and 'direct supervision.' Dr. Michelson disregarded entirely the fact that a morgue attendant works

with — and on —cadavers." 799 F.Supp. at 1399 (A125).

- "[O]n Dr. Michelson's model, a police officer who patrols the streets of Nassau County is deemed to have the attribute of the capacity to learn to use a gun, but his captain at headquarters is recorded for the attribute of active use of a gun . . . . the court cannot help but wonder whether a modicum of common sense in instances such as this might have produced a more 'exacting model' of the Nassau County salary system." 799 F.Supp. at 1398 (A124).

Finally, the district court found "the complete failure of Dr. Michelson's study to account for the effect of market forces on the present salary disparity in Nassau County" to be of "great significance." 799 F.Supp. at 1401 (A130).

The district court's finding that Dr. Michelson's testimony lacked any factual or scientific foundation was separate and distinct from its finding that he lacked credibility as a witness. *Contra*, 96 F.3d at 652 (A23) ("But a claim is not necessarily frivolous because a witness is disbelieved or an item of evidence is discounted, disproved or disregarded at trial . . . . Generally, where evidence is introduced that, if credited, would suffice to support a judgment, fees are unjustified.").

The conclusions of AFSCME's other expert, Dr. Donald J. Treiman, a sociologist, were equally baseless. Dr. Treiman promised to "replicate the Nassau County job evaluation process." 799 F.Supp. at 1379 (A77). Although he employed several first-year graduate students to rate four different

factors for each of 325 different job specifications, the district court found that "e*very* database used by Dr. Treiman in each of the studies he prepared . . . was created by the plaintiffs' attorneys." *Id.* at 1382 (A84). The district court concluded that "far from tracking the . . . job evaluation process — the exercise was a study in poor guidance, incomplete information and inadequate time." *Id.* at 1380 (A80). The district court deemed Dr. Treiman's study to be "so flawed as to render it unreliable and of no probative value in this case." *Id.* at 1380 (A79). Some of Dr. Treiman's lapses in methodology included the following:

- Dr. Treiman conceded that it was essential to know the number of employees supervised by incumbents in a particular job title in order to evaluate the "supervisory responsibility" factor, but he provided no such information to the graduate students and simply told them to do the "best that they could" without it. 799 F.Supp. at 1380 (A79).

- Rather than investigate the large and numersous disparities in ratings among the graduate students, Dr. Treiman "simply 'averaged out' their results." 799 F.Supp. at 1381 (A80).

- Dr. Treiman "erroneously coded a job requirement of 'elementary education' as six years rather than as eight years because he was drawing on his experience as 'a boy in California' rather than on the actual school

> system in Nassau County." 799 F.Supp. at 1383 (A86).

Dr. Treiman's embarrassing ordeal on the witness stand was over by December 22, 1989. Nevertheless, the trial continued through May 1990 and included depositions taken around the country to perpetuate testimony from witnesses who were physically unable to appear for trial or beyond the reach of a subpoena.

While not all of AFSCME's allegations can be characterized as "frivolous",[1] its decision to proceed in the

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[1] The back pay award was confined to police detention aide, a single job title among hundreds encompassed by AFSCME's sweeping claim of gender discrimination. That claim was completely obscured by the magnitude of AFSCME's challenge to Nassau County's compensation system and stands as a Pyrrhic victory. AFSCME caused millions of dollars to be spent in litigation for a result that could have been achieved years earlier through any number of more economical procedures, *e.g.*, collective bargaining. The district court recognized the incongruity:

> An exercise of restraint discourages comment upon the extent to which this litigation exacerbated the emotional involvement of the individually named parties and members of the class in this lawsuit; the extent to which expectations of financial rewards were encouraged and subsequently dashed; the extent to which anxieties were caused by the specter of financial liability; the extent to which enormous expenditures of money and energy were devoted to the prosecution and defense of this lawsuit—possibly at a cost to other, if not higher, values. 799 F.Supp. at 1417 (A168-A169).

> AFSCME's irresponsible and unreasonable litigation strategy subverted Title VII and deflected scarce municipal and judicial resources from redressing legitimate claims.

face of these devastating revelations was patently unreasonable and justifies a fee award. In *Christiansburg*, this Court held that a prevailing Title VII defendant is entitled to recover attorney's fees "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." 434 U.S. at 421. The court of appeals truncated its review under *Christiansburg* to identify only the signposts of a "frivolous" claim and found none. Thus, the court of appeals discounted the district court's careful and undisputed evaluation of the evidence and disregarded the "dual" policies behind Congress' enactment of section 706(k).[2]

The Second Circuit is not the first court of appeals to collapse the disjunctive *Christiansburg* criteria into a single standard of frivolousness; the Seventh and Ninth Circuits have done the same. This homogenization of the *Christiansburg* standard demands correction. "Unreasonable" is not limited to "frivolous." This Court would not use three words to define

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[2] This Court observed in *Christiansburg* that while Congress incorporated the fee shifting provision into Title VII "to clear the way for suits to be brought under the Act, it also wanted to protect defendants from burdensome litigation having no legal or factual basis." 434 U.S. at 420. "First, Congress desired to make it easier for a plaintiff of limited means to bring a meritorious suit . . . But second, and equally important, Congress intended to deter the bringing of lawsuits without foundation by providing that the 'prevailing party' — be it plaintiff or defendant — could obtain legal fees." *Id.* (*quoting Grubbs v. Butz*, 548 F.2d 973, 975 (D.C.C. 1976)). Accordingly, the Court declined to adopt a standard that would entitle a prevailing Title VII defendant to recover attorney's fees only upon a finding that the plaintiff's action was brought in bad faith.

a standard which required only one. By eschewing any inquiry into whether a plaintiff's pursuit of factually groundless claims was unreasonable, the Second Circuit and other courts have improperly heightened the *Christiansburg* standard. In complex class action suits, like the one at bar, that inquiry was required.

As this case demonstrates, a standard which requires a prevailing defendant to show that a plaintiff's claims were nothing short of "frivolous" will rarely be met absent some indication that the plaintiff acted in bad faith. Indeed, the Seventh Circuit has observed that fees should be assessed under *Christiansburg* only where "the plaintiff's conduct was abusive, or merely a disguised effort to harass or embarrass the defendant." *Badillo v. Central Steel & Wire Company*, 717 F.2d 1160, 1164 (7th Cir. 1983). *See also Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1277-78 (7th Cir. 1983); *Linhart v. Glatfelter*, 771 F.2d 1004 (7th Cir. 1985). In the Sixth and Ninth Circuits, a prevailing defendant may recover fees only in "exceptional" or "egregious" cases. *See Noyes v. Channel Products, Inc.*, 935 F.2d 806, 810 (6th Cir. 1991); *Barry v. Fowler*, 902 F.2d 770, 773 (9th Cir. 1990); *EEOC v. Bellemar Parts Industries*, 868 F.2d 199 (6th Cir. 1989); *Mitchell v. Office of Los Angeles County*, 805 F.2d 844, 848 (9th Cir. 1986) (Hall, J., concurring); *Jones v. Continental Corp.*, 789 F.2d 1225, 1232 (6th Cir. 1986) ("An award of attorney's fees against a losing plaintiff in a civil rights action is an extreme sanction, and must be limited to truly egregious cases of misconduct."); *compare Thomas v. Bible*, 983 F.2d 152 (9th

Cir. 1993) (Noonan, J., dissenting).[3] Of course, *Christiansburg* rejects the proposition that bad faith is a prerequisite for an award of attorney's fees. *See supra,* at 10n.1.

The opinion below demonstrates how a sterile review for indicia of "frivolity" fails to effectuate the dual purposes of section 706(k), particularly in a complex case. Nassau County was forced to meet the "enormous expenditures of money and energy" which AFSCME devoted to prosecuting this lawsuit, even after its expert witnesses had been thoroughly discredited and its Title VII claim lay in ruin. 799 F.Supp. at 1417 (A169). The trial took place over the course of more than five months, affording AFSCME ample opportunity to consider the reasonableness of continued litigation. By the conclusion of Dr. Treiman's testimony in December 1989, it was obvious that AFSCME's sweeping claims of intentional discrimination could not be established. Nassau County should not bear the financial consequences of AFSCME's willful pursuit of futile claims.

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[3] Other circuits correctly observe that while "in some instances a frivolous case will be quickly revealed as such, it may sometimes be necessary for defendants to 'blow away the smoke screens the plaintiffs ha[ve] thrown up' before the defendants may prevail." *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993) (*quoting Introcaso v. Cunningham*, 857 F.2d 965, 967 (4th Cir. 1988); *see also Flowers v. Jefferson Hospital Association*, 49 F.3d 391 (8th Cir. 1995); *Blue v. United States Dept. of Army*, 914 F.2d 525 (4th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991).

II

Section 113 of the Civil Rights Act of 1991, which provides for the recovery of expert fees by a prevailing party, regulates secondary rather than primary conduct and therefore constitutes a procedural amendment to the statutory scheme which may be applied in suits arising before its enactment.

Nassau County is entitled to recover its expert witness fees under section 113 of the Civil Rights Act of 1991 (the "1991 Act"). While this Court has not squarely addressed the question, the analytical framework of *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994), and *Rivers v. Roadway Express, Inc.*, 114 S.Ct. 1510 (1994), compels the conclusion that section 113 regulates only litigation conduct and therefore is a "procedural" amendment which may be applied retrospectively.

In *Landgraf*, this Court held that section 102 of the 1991 Act could not be applied retrospectively because it authorized punitive and compensatory damages for intentional discrimination, thereby attaching "an important new legal burden to that conduct." *Landgraf*, 114 S.Ct. at 1506. The Court found the new jury trial provision to fall within the same category because it was contingent upon a demand for punitive or compensatory damages. *Id.* at 1505. In *Rivers*, the Court similarly held that Section 101 of the 1991 Act could not be applied retrospectively because it increased employer liability and established a new standard of conduct by enlarging 42 U.S.C. § 1981 to encompass "all aspects of the contractual relationship, including terminations." *Rivers*, 114 S.Ct. at 1514.

While these particular amendments only apply prospectively, "there is no special reason to think that all the diverse provisions of the Act must be treated uniformly for such purposes." *Landgraf*, 114 S.Ct. at 1505. Both *Landgraf* and *Rivers* addressed provisions that either created or increased a party's substantive liability under a particular cause of action. However, the *Landgraf* Court emphasized that its holding did not govern forms of relief that were unrelated to the conduct or injury underlying the pleaded legal claims. Thus, the Court explained that "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity" because rules of procedure create less important reliance interests and regulate secondary rather than primary conduct. *Landgraf*, 114 S.Ct. at 1502.

The Court illustrated this distinction by affirming the continuing vitality of *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1969), which upheld a retroactive award of attorney's fees under a statute enacted while the case was on appeal. In language equally applicable to the expert fees available under § 113, the *Landgraf* Court observed:

> [T]he attorney's fee provision at issue in *Bradley* did not resemble the cases in which we have invoked the presumption against statutory retroactivity. Attorney's fee determinations, we have observed, are "collateral to the main cause of action" and "uniquely separable from the cause of action to be proved at trial."

Landgraf, 114 S.Ct at 1503 (*quoting White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 451-52 (1982)).

The Court also cited with approval two other cases which highlight the difference between monetary awards that compensate for the injury sued on, and those which simply reimburse the costs of litigation. In *White*, the Court noted that "[u]nlike other judicial relief, the attorney's fees allowed under § 1988 are not compensation for the injury giving rise to the action." 455 U.S. at 452. Similarly, in *Hutto v. Finney*, 437 U.S. 678 (1978), the Court found that the "remedial" nature of attorney's fees awards under a new statute was so distinct that it defeated not only the presumption against retroactivity, but the State's Eleventh Amendment immunity defense as well. In *Hutto*, the Court explained:

> Unlike ordinary "retroactive" relief such as damages or restitution, an award of costs does not compensate the plaintiff for the injury that first brought him to court. Instead, the award reimburses him for a portion of the expenses he incurred in seeking prospective relief . . . Moreover, like the power to award attorney's fees for litigation in bad faith, the power to assess costs is an important and well-recognized tool used to restrain the behavior of parties during litigation . . . When a State defends a suit for prospective relief, it is not exempt from the ordinary discipline of the courtroom.

Hutto, 437 U.S. at 695n.24.

Expert witness fees do not arise from the injury or conduct that initially brings the parties into court. Rather, an expert fee

award reimburses a party for litigation costs. Such awards serve as a tool to restrain the behavior of the parties during litigation. Accordingly, under the *Landgraf* framework, the expert fees provision of the 1991 Act is a "procedural" amendment that may be applied in cases arising before its enactment.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Dated: December 26, 1996
New York, New York

Respectfully submitted,

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APPENDICES

APPENDIX A

FEDERAL REPORTER, 3d SERIES

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO (AFSCME); Civil Service Employees Association, Inc., Region 1/Local 1000, (CSEA); Rita Wallace; Rachel Braver; Dorothy Garage; Linda Kelly; Lois Whitely, on behalf of themselves and all others similarly situated, Plaintiffs-Counter-Defendants-Appellants-Cross-Appellees,

Odessa Colvin; Erna Fluhr; Laurie Gillibertie; Stephen Goldberg; Fred Jordan, Plaintiffs-Counter-Defendants,

v.

COUNTY OF NASSAU; Nassau County Executive; Nassau County Comptroller; Nassau County Board of Supervisors; Nassau County Civil Service Commission, Defendants-Counter-Claimants-Appellees-Cross-Appellants.

Nos. 1140, 1610, Dockets 95-9022 (L), 95-9024 (XAP).

United States Court of Appeals,
Second Circuit.

Argued April 3, 1996.

Decided Sept. 26, 1996.

County moved for award of attorney fees and expert witness fees in public employees union's gender discrimination action under Title VII. The United States District Court for the

Eastern District of New York, Israel Leo Glasser, J., awarded county $982,407.23 in attorney fees and $550,974.66 in expert witness fees, and union appealed both decisions. The Court of Appeals, Jacobs, Circuit Judge, held that district court abused its discretion in granting fee award to county after union prevailed on closely related salary disparity claim.

Reversed.

1. Federal Courts k 830

Award of fees under Title VII is within discretion of trial court and will not be upset unless abused. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

2. Civil Rights k 416

Public employee union and individual county employees established prima facie case of gender-based pay discrimination under Title VII by introducing statistics tending to show unexplained differential in wages, so that their case was not frivolous to justify fee award, where two experts testified that, when all other relevant job characteristics were considered, there remained substantial differential in pay of men and women in county. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

3. Civil Rights k 411

In determining whether valid claim for attorney fees under Title VII has been established, assessment of evidence and testimony is within province of trier of fact. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

4. Civil Rights k 416

Claim for attorney fees under Title VII is not necessarily frivolous because witness is disbelieved or item of evidence is discounted, disproved or disregarded at trial. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

5. Civil Rights k 415

District court abused its discretion in granting fee award to county in public employee union's gender discrimination action, though union failed in its broader claim that county's entire pay scale was discriminatory, where it prevailed on closely related claim that salary disparity between predominately female police detention aides and predominantly male turnkeys was discriminatory, and where district court awarded judgment in excess of $1.6 million on that claim. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

Paul M. Smith, Washington, DC (Susan R. Podolsky, Sean H. Donohue, Jenner & Block, Washington, DC, on the brief), for Plaintiffs-Counter-Defendants-Appellants-Cross-Appellees.

William H. Pauley, III, New York City (Charles D. Cunningham, Stewart J. Epstein, Edward J. Phillips, Snitow & Pauley, New York City, on the brief) for Defendants-Counter-Claimaints-Appellees-Cross-Appellants.

C. Gregory Stewart, General Counsel, Gwendolyn Young Reams, Associate General Counsel, Vincent J. Blackwood, Assistant General Counsel, Samuel A. Marcosson, Attorney, Equal Employment Opportunity Commission, Washington,

DC, for amicus curiae Equal Employment Opportunity Commission.

Elaine R. Jones, Theodore M. Shaw, Norman J. Chachkin, Charles Stephen Ralston, David T. Goldberg, Paul K. Sonn, NAACP Legal Defense and Educational Fund, Inc., Donna Lenhoff, Women's Legal Defense Fund, Leon Friedman, New York Civil Liberties Union, Herbert Eisenberg, National Employment Lawyers Association, for amici curiae NAACP Legal Defense and Educational Fund, Inc., Women's Legal Defense Fund, New York Civil Liberties Union and National Employment Lawyers Association (New York Chapter).

Before: WINTER, JACOBS and CALABRESI, Circuit Judges.

JACOBS, Circuit Judge:

In this appeal, we consider the circumstances in which defendants may recover attorney's fees from plaintiffs in actions under Title VII.

In 1984, the American Federation of State, County and Municipal Employees, one of its affiliates and several individual employees (collectively referred to as "AFSCME") commenced this civil rights action against Nassau County and several of its officers (variously, the "County" and the "defendants"). AFSCME alleged that the County's job classification system assigned lower salary grades to jobs that were predominantly held by women than to jobs that were predominantly held by men, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. § 206(d). In 1985, the United State District Court for the Eastern District of New York

(Glasser, *J.*) dismissed AFSCME's disparate impact claim, but declined to dismiss AFSCME's disparate treatment claim. *AFSCME v. County of Nassau,* 609 F.Supp. 695, 708-12 (E.D.N.Y.1985). Under the remaining disparate treatment theory, AFSCME was required to establish that the County intended to discriminate against women in implementing the job classification system. *See International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854-55 n. 15, 52 L.Ed.2d 396 (1977).

On August 24, 1992, following a 16-day bench trial, Judge Glasser issued a memorandum and order holding, among other things, (i) that AFSCME failed to establish discriminatory intent with respect to its claim that the County's implementation of its pay system discriminated against all women who worked in female-dominated jobs; but (ii) that AFSCME did succeed in establishing that the County intentionally discriminated in paying police detention aides (a position predominantly held by women) less than turnkeys (a better-paid position predominantly held by males), in violation of Title VII. *AFSCME v. County of Nassau,* 799 F.Supp. 1370, 1414, 1416 (E.D.N.Y.1992). The district court ordered the County to pay the female police detention aides a total of $1.6 million in back pay for a fourteen-year period. No appeal was taken from that decision.

The County moved for an award of attorney's fees and expert witness fees pursuant to 42 U.S.C. § 2000e-5(k), which provides for recovery of such fees by prevailing parties. In 1993, the district court held that AFSCME's claims were frivolous under *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978), and awarded

the defendants $982,407.23 in attorney's fees. *AFSCME v. County of Nassau,* 825 F.Supp. 468, 473-74 (E.D.N.Y.1993). The Court deferred decision on the defendants' motion for expert witness fees pending the outcome of a case that was then before the Supreme Court concerning the retroactivity of a 1991 amendment to 42 U.S.C. § 2000e-5(k) that expressly made expert witness fees available to prevailing parties. *Id.* at 474. In an unpublished memorandum and order date May 31, 1995, the district court held that the 1991 amendment applied retroactively under *Landgraf v. USI Film Products,* 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), and therefore awarded the County $550,974.66 in expert witness fees. AFSCME appeals both of those decisions.

Attorney's fees and expert witness fees may not be awarded to a prevailing defendant in a Title VII case unless the plaintiff's claim is "frivolous, unreasonable, or groundless, or... the plaintiff continued to litigate after it clearly became so." *Christiansburg,* 434 U.S. at 422, 98 S.Ct. at 701; *see also Rounseville v. Zahl,* 13 F.3d 625, 632 (2d Cir.1994). AFSCME established a prima facie case of a violation of Title VII; introduced extensive statistical evidence through the testimony of two expert witnesses which, if credited, could have supported a judgment in its favor; and won $1.6 million of its claim that the County intentionally discriminated in paying police detention aides (predominantly women) less than turnkeys (predominantly men). *AFSCME,* 799 F.Supp. at 1416. Under these circumstances, we conclude that AFSCME's claims were not "frivolous, unreasonable or groundless." We therefore hold that the district court abused its discretion in awarding attorney's and expert witness fees to the County, and reverse the judgments.

BACKGROUND

Nassau County, New York, employs more than 19,000 people in more than 1,500 jobs. Their salaries are determined by the salary grade assigned to their job title and their seniority. *Id.* at 1373-74. The present compensation system was implemented after a comprehensive job and salary evaluation was conducted between 1964 and 1967. The details of the job evaluation process (called the "Cresap" process after the management consulting firm that assisted the County) are lucidly explained in the district court's 1992 opinion, *see id.* at 1374-77, and will only be summarized briefly herein.

First, a team of management consultants and County managers surveyed several thousand employees. After assessing the skills required and tasks performed in each occupation, they created a taxonomy of 650 job titles. *Id.* at 1375. The team then composed job specifications that described the characteristics of each job in terms of certain prescribed criteria (*i.e.*, the typical duties, the complexity of the duties, and the required qualifications). The County assigned a numerical salary grade to four factors for each job title: (i) the skills and knowledge required by the job; (ii) the variety and complexity of the job duties; (iii) any responsibility for independent action; and (iv) any supervisory responsibility. *Id.* The numerical values for the four factors for each job title were then weighted and totaled. Other information gathered during the classification process was used to revise the totals. *Id.* at 1376. Finally, the scores were organized into twenty-seven ranges to correspond with salary grades ranging from one to twenty-seven. *Id.* (It appears that no consideration was given to the wage that any job would

command in the labor market.) The County passed an ordinance enacting the final job titles and salary grades in May 1967. *Id.* at 1377.

As of the time of the trial, three-quarters of the County's employees held job titles established by the Cresap process, and were paid in accordance with the salary grades adopted in 1967.

Between 1967 and 1991, the job classification system was altered by the County in three ways: (i) several new job titles were created by the County's Civil Service Commission; (ii) the pay grades of several job titles were raised by the Civil Service Commission; and (iii) higher pay grades and salary levels were assigned to several job titles as a result of collective bargaining. *Id.* at 1377-78.

AFSCME is the collective bargaining representative for the employees of Nassau County. AFSCME's amended complaint alleged that the County "discriminates in compensation on the basis of sex by paying historically female job classifications less than historically male classifications which require an equivalent or lesser composite of skill, effort, responsibility and working conditions," in violation of Title VII and the Equal Pay Act. *Id.* at 1372 (quoting amended complaint, ¶3(D)). The amended complaint asserted rights on behalf of all employees of the County, and defined "historically female" and "historically male" job classifications as those in which more than 70% of the positions have always been held by persons of that sex. *Id.* The individual plaintiffs alleged specific violations of Title VII and the Equal Pay Act with respect to their particular job titles.

Prior to discovery, the County moved to dismiss all of AFSCME's claims. On May 17, 1985, the district court dismissed the Equal Pay Act claims of three of the individual plaintiffs, and dismissed the Title VII claims of all of the plaintiffs "insofar as they seek relief under [a] disparate impact theory." *AFSCME,* 609 F.Supp. at 713. But the court denied the County's motion to dismiss with respect to AFSCME's disparate treatment claim, and granted AFSCME leave to amend its complaint to better plead a disparate impact claim. *Id.* AFSCME never made such an amendment. On July 13, 1987, the court dismissed the Title VII claims of all the County's male employees for lack of standing; certified a class composed of all the female employees who, since July 28, 1982, worked in jobs held at least 70% by women; and designated two individual employees and AFSCME and its affiliate, Local 1000 of the Civil Service Employee Association, to represent the class. *AFSCME v. County of Nassau,* 664 F.Supp. 64, 67, 69 (E.D.N.Y.1987). Extensive discovery took place from 1985 to 1989.

At trial, AFSCME proceeded under two theories: that the County intentionally discriminated against *all* women in *all* historically female positions, and that the County intentionally discriminated against particular women in three particular historically female positions.

As to its broader claim, AFSCME contended that during the Cresap process the County " 'selectively departed from [its wage setting] methodology in a deliberate effort to favor male-dominated job titles while disfavoring the most significant female-dominated titles,' " in violation of Title VII and the Equal Pay Act. *AFSCME,* 799 F.Supp. at 1378

(quoting AFSCME's post-trial brief). Because AFSCME never amended its complaint to adequately plead a disparate impact claim, AFSCME was required to introduce evidence from which it could be inferred that the County intentionally discriminated in setting the pay scale in order to prevail under a disparate treatment theory. *See Teamsters,* 431 U.S. at 335 n. 15, 97 S.Ct. at 1854-55 n. 15 (discriminatory intent must be shown in disparate treatment cases).

AFSCME also contended that the County violated the Equal Pay Act and Title VII by setting lower salaries for three particular job groups held predominantly by women. In particular, AFSCME contended that police communication operators, mainly women, were paid less than fire communications technicians, mainly men; that police detention aides were paid less than turnkeys; and that clerical workers were paid less than correction officers assigned to clerical tasks. *AFSCME,* 799 F.Supp. at 1407-1409.

At trial, AFSCME presented no direct evidence that the County intentionally discriminated in setting pay, but instead relied on statistical evidence tending to show that jobs filled predominantly by women were paid less than jobs filled predominantly by men. *See Teamsters,* 431 U.S. at 339-40, 97 S.Ct. at 1856-57 (Title VII plaintiff may rely on statistics in a disparate treatment case to show discriminatory intent). AFSCME relied on the testimony of two expert witnesses: Dr. Stephan Michelson, a labor economist, and Dr. Donald J. Treiman, a sociologist. Dr. Michelson's testimony was offered to show that the County *currently* discriminated by failing to correct disparities in pay, and by employing methods to assign pay grades that resulted in disparities. *AFSCME,* 799 F.Supp.

at 1395. He testified about a study he made of the County's current job classification and wage system in which he concluded that, after more than 30 gender-neutral variables were accounted for, there remained a gap of approximately $3000 between equivalent historically male and historically female jobs. *Id.* at 1396. Michelson averred that this gap could be explained only by the sex of the County's employees. *Id.*

Dr. Treiman's testimony was offered to show that the County intentionally discriminated in establishing salary grades during the 1967 Cresap process. Dr. Treiman testified about two studies. The first was his study of the County's job classification system, in which he attempted to replicate the 1967 Cresap process in order to see if he would reach a similar result. *Id.* at 1379. Five graduate students were hired to rate each job title in accordance with the four factors used by the County in the Cresap process, and to assign each job to one of twenty-seven pay grades in accordance with those values. Dr. Treiman then compared the results of this study with the actual pay grades and job classifications used by the County. The sociologist concluded that the County had "not applied the job evaluative criteria in a 'good faith' manner," and that the County "'applied the [Cresap] criteria in a way that systematically discriminated against jobs performed mainly by women.'" *Id.* at 1380 (quoting report of Dr. Treiman).

Second, Dr. Treiman testified as to a study in which he analyzed each job classification using two criteria that he believed were objectively measurable: the amount of training and experience required, and whether the position entailed supervisory responsibility. *Id.* at 1381. After comparing jobs that require similar training and experience, and those that

entail the same supervisory responsibility, Dr. Treiman again concluded that in 1967 the County "could not have applied the Cresap job-evaluation procedures in a good faith manner." *Id.*

The County offered the testimony of two experts, Dr. David Jones, an industrial psychologist, and Dr. Joan Haworth, a labor economist and statistician. Dr. Jones testified about a study in which he tried to replicate the results of the 1976 Cresap process. *Id.* at 1384. This study, conducted in much the same way as Dr. Treiman's first study, was intended to show that Dr. Treiman's specific methodology was flawed. According to Dr. Jones, any disparity in salaries between male and female predominated jobs could be accounted for statistically by introducing a variable that represented the prevailing wages for those jobs in the regional job market. *Id.* Dr. Haworth testified that she had performed a similar study, and also concluded that any disparity in salaries was explained by market forces. *Id.* at 1390. Both experts therefore opined that the "salary grade differentials are not the product of sex discrimination but of an attempt to adjust salary grades so as to track market salaries and so as not to depart" from salaries that existed prior to the 1967 job classification process. *Id.* at 1391.

On August 24, 1992, the district court issued an opinion and order holding in part that AFSCME (i) failed to establish that the County intentionally discriminated against women when it set the pay scale for its employees in 1967, *id.* at 1392, 1412; and (ii) failed to show that the County intentionally discriminated in its conduct subsequent to the 1967 Cresap job classification process, *id.* at 1405, 1412. In arriving at these conclusions, the district court found that the studies on which

AFSCME relied were deeply flawed. Dr. Treiman's study attempting to reconstruct the Cresap process was found to be "a study in poor guidance, incomplete information, and inadequate time," entitled to no weight. *Id.* at 1380. The court found that Dr. Michelson's study, on which AFSCME relied to show that the County presently discriminated, had serious "methodological shortcomings," *id.* at 1397, was flawed by "selective departures from [its] stated methodology," *id.* at 1399, "deliberately omitted" relevant variables, *id.* at 1400, and failed to account for market forces,[1] *id.* at 1401. On the other hand, the court found Dr. Haworth's testimony (sponsored by the County), that differences in pay that developed after 1967 were the result of market forces, "reliable and credible," and entitled to "great weight." *Id.* at 1403.

After rejecting AFSCME's more generalized claim that the County intentionally discriminated in setting pay, the district court turned to AFSCME's claims that the County intentionally set lower pay for three specific positions held predominately by women. The district court found that AFSCME failed to show the requisite comparability between the jobs of a police communications operator and a fire communications technician, *id.* at 1408; or between the jobs of a clerical worker and a correction officer, *id.* at 1409-10. Thus, AFSCME could not establish a violation of Title VII or the Equal Pay Act with respect to these positions.

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[1] Evidence was introduced that the County considered market forces in setting salary grades subsequent to 1967.

However, the court found that the work performed by police detention aides (predominantly women) was substantially similar to that performed by turnkeys (predominantly men); that police detention aides were paid less than turnkeys; and that "the salary disparity between these two groups is attributable to intentional discrimination." *Id.* at 1409. The court noted that "this single instance of discrimination... does not, without more, establish the broader claims of the plaintiffs in this action." *Id.* On August 16, 1993, the district court ordered the County to pay the female police detention aides in the certified class a total of $1.6 million in back pay for a fourteen year period.

No appeal was taken on any issue of liability.

After trial, the County moved for attorney's fees and expert witness fees pursuant to 28 U.S.C. § 2000e-5(k). In a memorandum and order dated June 24, 1993, the district court found that the "plaintiffs' pursuit of their claims was unreasonable and without foundation," the standard for assessing fees against a losing plaintiff under *Christiansburg*, 434 U.S. at 422, 98 S.Ct. at 701, and therefore awarded the County $982,407.23 in attorney's fees. *AFSCME*, 825 F.Supp. at 473-74. In concluding that AFSCME's claims were frivolous, the court noted that the only evidence introduced to support AFSCME's claim was expert testimony that was found to be flawed and unreliable, that AFSCME offered no other proof of discriminatory intent, and that AFSCME was a "major union" and "not economically or otherwise disadvantaged." *Id.* at 471-73.

Expert witness fees were expressly made available to prevailing parties in a 1991 amendment to 42 U.S.C. §

2000e-5(k). *See* Pub.L. 102-166, Tit. I, § 113(b), 105 Stat. 1075, 1079 (Nov. 21, 1991). Because this case was tried prior to 1991, the availability of expert witness fees depended on whether the 1991 amendment is retroactive. At the time that the County's motion for expert witness fees was before the district court (in 1993), the Supreme Court had granted certiorari in *Landgraf v. USI Film Prods.* to resolve the retroactivity issue. *See* 507 U.S. 908, 113 S.Ct. 1250, 122 L.Ed.2d 649 (1993) (granting certiorari). The district court deferred ruling on the County's motion for expert witness fees pending the outcome of *Landgraf*. In 1994, the Supreme Court issued its decision in *Landgraf*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) and a companion case, *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994). In an unpublished memorandum and order dated May 31, 1995, the district court described *Rivers* and *Landgraf* as holding that retroactive application procedural rules is permissible, determined that the expert witness fee provision of Title VII is analogous to a procedural limitations provision because it applies to "secondary conduct—namely litigation conduct, not the alleged acts of discrimination," and therefore held that the 1991 amendment applied retroactively to this case. Accordingly, the court awarded the County $550,974.66 in expert witness fees.

DISCUSSION

AFSCME appeals on two grounds. First, AFSCME contends that its claims were not "frivolous, unreasonable or groundless" under *Christiansburg*, 434 U.S. at 422, 98 S.Ct. at 701, and that the district court therefore abused its discretion in awarding attorney's and expert witness fees to the County.

Second, AFSCME contends that, even if its claims were frivolous, an award of expert witness fees was improper because the 1991 amendment to 42 U.S.C. § 2000e-5(k) does not apply retroactively to this case. Because we conclude that AFSCME's claims were not frivolous, and therefore *no* fees may be awarded under *Christiansburg*, we do not reach the retroactivity issue.

[1] An award of fees under Title VII "is within the discretion of the trial court and will not be upset unless abused." *Carrion v. Yeshiva Univ.*, 535 F.2d 722, 727-28 (2d Cir.1976). As amended, section 706(k) of Title VII of the Civil Rights Act of 1964 provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs....

42 U.S.C. § 2000e-5(k). The clause "(including expert fees)" was added by the Civil Rights Act of 1991. *See* Pub.L. 102-166, Tit. I, § 113(b), 105 Stat. 1075, 1079 (Nov. 21, 1991).

Although the text of the statute does not distinguish between prevailing plaintiffs and prevailing defendants, the Supreme Court has held that a defendant is *not* entitled to an award of fees on the same basis as a prevailing plaintiff. *See Christiansburg*, 434 U.S. at 418-19, 98 S.Ct. at 699. The Court articulated "two strong equitable considerations" for permitting routinely an award of fees to prevailing plaintiffs that "are wholly absent" when a defendant prevails. *Id.* at 418, 98, S.Ct. at 699. First, "the plaintiff is the chosen instrument

of Congress to vindicate 'a policy that Congress considered of the highest priority.'" *Id.* (quoting *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968)). "Second, when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law." *Id.* Mindful of those distinctions, the Court held that

> a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's actions was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.

Id. at 421, 98 S.Ct. at 700. Finally, the Court warned district courts to avoid "engag[ing] in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Id.* at 421-22, 98 S.Ct. at 700.

The *Christiansburg* standard for fee awards to prevailing defendants has been applied to civil rights cases arising under 42 U.S.C. § 1983, and to cases arising under other statutes that authorize fee awards. *See Hensley v. Eckerhart,* 461 U.S. 424, 429 n.2, 103 S.Ct. 1933, 1937 n.2, 76 L.Ed.2d 40 (1983) (action arising under § 1983); *Hughes v. Rowe,* 449 U.S. 5, 15, 101 S.Ct. 173, 178-79, 66 L.Ed.2d 163 (1980) (per curiam) (same); *Rounseville,* 13 F.3d at 632 (whether § 1983 defendants may be awarded fees "generally turns on whether the [plaintiff's] claim itself is clearly meritless"); *Sassower v. Field,* 973 F.2d 75, 79 (2d Cir.1992) (fees arguably warranted if "claim, though requiring jury consideration, was entirely

insubstantial"), *cert. denied,* 507 U.S. 1043, 113 S.Ct. 1879, 123 L.Ed.2d 497 (1993).

We have indicated in particular cases what is meant by "frivolous, unreasonable, or without foundation." In *Gerena-Valentin v. Koch,* 739 F.2d 755, 756-57 (2d Cir.1984), the plaintiff claimed that two municipal employees conspired to keep him off the ballot in an election for New York City councilman, in violation of the Voting Rights Act, 42 U.S.C. § 1973 *et seq.* Applying the *Christiansburg* standard, we approved a fee award to the prevailing defendants because the plaintiff had already litigated the issue (unsuccessfully) in state court, and because "at no time... did [the plaintiff] attempt to produce any evidence whatsoever in support of his retaliation and conspiracy claim." *Id.* at 761. In *Eastway Constr. Corp. V. City of New York,* 762 F.2d 243, 246 (2d Cir.1985), a general contractor charged the City of New York and others with violating the antitrust and civil rights laws by prohibiting it from contracting with other companies "engaged in City-financed reconstruction projects." The effect of the City's action was to put the plaintiff-contractor out of business. *Id.* Again applying *Christiansburg,* we approved a fee award to the defendant because the plaintiff "could not point to a deprivation of any single right conferred by federal law or the ... Constitution," and had unsuccessfully challenged the City's action in state court. *Id.* at 252. And in *Faraci v. Hickey-Freeman Co.,* 607 F.2d 1025, 1027-29 (2d Cir.1979), we approved a fee award against a Title VII plaintiff where the evidence of non-discrimination was "uncontradicted." *See also Harbulak v. County of Suffolk,* 654 F.2d 194, 196-98 (2d. Cir.1981) (approving fee award against Title VII plaintiff who alleged police officer violated his right to privacy by reaching

into his car to serve summons); *Prate v. Freedman,* 583 F.2d 42, 47-48 (2d Cir.1978) (approving fee award against Title VII plaintiffs where "there was little or no chance that they would be permitted to attack [a prior consent decree and] judgment through a new suit").

AFSCME asserted claims that were actionable under Title VII and had not previously been litigated, and offered proof as to each element of each claim. The County, of course, ultimately prevailed on most of AFSCME's claims; but that alone is insufficient to justify an award of fees under the *Christiansburg* standard. After reviewing all the circumstances of this case and the proof introduced at trial, taken together, we are persuaded that AFSCME's case was not "frivolous, unreasonable, or without foundation" so as to permit an award of fees under Title VII.

1. AFSCME Established A Prima Facie Case.

[2] First, plaintiffs established a prima facie case of gender-based pay discrimination by introducing statistics tending to show an unexplained differential in wages. *See Hazelwood School Dist. v. United States,* 433 U.S. 299, 306-08, 97 S.Ct. 2736, 2741-42, 53 L.Ed.2d 768 (1977) (gross statistical disparities may prove prima facie case of discrimination); *Teamsters,* 431 U.S. at 339-40, 97 S.Ct. at 1856-57 (same). AFSCME's two experts testified that, when all other relevant job characteristics were considered, there remained a substantial differential in the pay of men and women in the County. *See AFSCME,* 799 F.Supp. at 1379-80, 1396. One of the County's two experts conceded that an unexplained pay differential existed:

> There's also still in all of these [job] specifications a gap between men['s] and women's salaries that has not been explained by the job specification variables.

See id. at 1401 (noting that Dr. Howarth confirmed "that there is indeed a gap between the salaries of men and women in Nassau County that is not explained by job specifications alone").

In determining whether AFSCME's claim was frivolous, the district court gave no weight to the prima facie case, and described it as "meaningless." 825 F.Supp. at 473. True, a prima facie case of discrimination may rest on a de minimis evidentiary showing. *See O'Connor v. Consolidated Coin Caterers Corp.*, — U.S. —, —, 116 S.Ct. 1307, 1310, 134 L.Ed.2d 433 (1996) (a prima facie case could possibly be based on the "very thin evidence" of a 68 year-old being replaced by a 65 year-old). But here, AFSCME's prima facie case was premised on several extensive statistical studies that undertook to show that the salary differential was not explained by the parameters of the Cresap process or by any other legitimate variables. Significantly, the existence of such an unexplained difference between salaries for men and women was conceded by the County. Under these circumstances, the prima facie case at least created a factual question as to the cause of the gap in pay, and might have supported an inference of intentional discrimination. *See Merrill v. Southern Methodist Univ.*, 806 F.2d 600, 607 (5th Cir.1986) (statistical evidence of wage disparity is probative of discrimination where "the employers unexplainedly departed from objective pay criteria they had adopted"). Indeed, had the County failed to respond to AFSCME's prima

facie case, the district court could have entered directed judgment against the County. *See Teamsters*, 431 U.S. at 361, 97 S.Ct. at 1867 (in Title VII class action, trial court may enter directed verdict against employer that fails to rebut prima facie case).

The district court therefore erred in affording AFSCME's ample prima facie case no weight in the calculus under *Christiansburg*. *See LeBeau v. Libbey-Owens-Ford Co.*, 799 F.2d 1152, 1160 (7th Cir.1986) (reversing grant of fees where EEOC established prima facie case and district court denied defendant's motions for summary judgment and directed verdict), *cert. denied*, 484 U.S. 815, 108 S.Ct. 67, 98 L.Ed.2d 31 (1987); *EEOC v. Tarrant Distribs., Inc.*, 750 F.2d 1249, 1251 (5th Cir.1984) (per curiam) (affirming denial of fees where EEOC established prima facie case).

2. AFSCME Introduced Sufficient Evidence

Because the district court had dismissed AFSCME's disparate impact claim, AFSCME was required to establish that the County intentionally discriminated in setting pay. Establishing intent is difficult in any case, and even more so when the trial takes place more than twenty years after many of the events at issue. Faced with this challenge, AFSCME relied on statistical evidence introduced by its experts. *See Teamsters*, 431 U.S. at 339 n.20, 97 S.Ct. at 1856-57 n. 20 ("Statistics showing racial or ethnic imbalance are probative... because such imbalance is often a telltale sign of purposeful discrimination."). Those experts testified that the differential in salaries could not be explained fully by job characteristics, and therefore justified an inference that the disparity in pay

between male- and female-predominated jobs was the result of intentional discrimination.

For many valid reasons, the district court—after a deft and sophisticated analysis of the complex data and methodologies, *see AFSCME*, 799 F.Supp. at 1378-1414—declined to credit the testimony, and ultimately concluded that AFSCME's statistical studies were flawed. On appeal, the County contends that AFSCME's decision to proceed to trial was unreasonable given the weak statistical evidence supporting its claim. But the court's disregard of AFSCME's statistical studies was based on determination concerning technical methodology, integrity and validity that the district court arrived at with the benefit of effective cross-examination and the counterweight of the County's experts and studies. AFSCME cannot be required to have anticipated these events and outcomes prior to trial. For example, the district court refused to credit the testimony of Dr. Treiman because (i) he was "extremely evasive and not entirely credible"; (ii) a subsequent report by him "recanted part of his [prior] conclusions"; and (iii) "the court found his methodology in the conduct of [his study] to be so flawed as to render it unreliable and of no probative value in this case." *Id.* at 1380. Under these circumstances, we cannot say—and the district court has not found—that AFSCME's claim was frivolous at the outset. So the County may obtain fees only if "the plaintiff continued to litigate after it['s claims] clearly became" frivolous. *Hughes v. Rowe*, 449 U.S. at 15, 101 S.Ct. at 178-79 (quoting *Christiansburg*, 434 U.S. at 422, 98 S.Ct. at 701). The County points to no evidence that meets this test.

[3,4] In determining whether a valid claim has been established, the assessment of evidence and testimony is of course within the province of the trier of fact. But a claim is not necessarily frivolous because a witness is disbelieved or an item of evidence is discounted, disproved or disregarded at trial. *Compare EEOC v. Sears, Roebuck & Co.*, 114 F.R.D. 615, 631-32 (N.D.Ill.1987) (claim not frivolous where defects in statistical evidence not fully revealed until trial) *with Carrion*, 535 F.2d at 728-29 (pre-*Christiansburg* decision affirming fee award where plaintiff's testimony was " 'an unmitigated tissue of lies' " and whose lawsuit was "motivated by malice and vindictiveness" (quoting district court decision)). Generally, where evidence is introduced that, if credited, would suffice to support a judgment, fees are unjustified. *See e.g., EEOC v. Consolidated Service Sys.*, 989 F.2d 233, 238 (7th Cir.1993) (affirming denial of fees because, "had the judge believed the Commission's witnesses, the outcome even of the disparate-treatment claim might have been different") (Posner, *J.*); *Johnson v. Allyn & Bacon, Inc.* 731 F.2d 64, 74 (1st Cir.) (fees under Title VII inappropriate where result "could well have gone the other way if the district court had believed" the plaintiff), *cert. denied*, 469 U.S. 1018, 105 S.Ct. 433, 83 L.Ed.2d 359 (1984); *EEOC v. Kimbrough Inv. Co.*, 703 F.2d 98, 103 (5th Cir.1983) (affirming denial of fees where plaintiff's statistical evidence was flawed but where "some testimony and some analysis of hiring practices was valid probative evidence").

In this case, AFSCME offered evidence as to each element of its claim. *Cf. Gevena-Valentin*, 739 F.2d at 761 (claim frivolous where no evidence of discrimination introduced); *Faraci*, 607 F.2d at 1027 (claim frivolous where evidence of

non-discrimination was overwhelming). Thus, had the district court credited the evidence and testimony that AFSCME sponsored, AFSCME could have prevailed. The district court recognized that possibility when it stated:

> It is easy to imagine that the plaintiffs could have trapped a victory in the web of statistical data spun by their expert witnesses were it not for a very able and experienced defense counsel who too mastered the statistics, regression analyses and complex computer data which enabled him to expose the deficiencies both in the experts' testimony and in the studies upon which the plaintiffs so heavily relied.

AFSCME, 825 F.Supp. at 473. A case that could have resulted in a victory for the plaintiff but for "very able and experienced defense counsel" was not frivolous so as to justify a fee award, at least in the absence of evidence of intentional misleading by the plaintiffs.

3. AFSCME Obtained a $1.6 Million Judgment.

[5] The award of fees here would arguably have presented a closer question had AFSCME recovered nothing of its claims. But AFSCME *prevailed* on its claim that the salary disparity between police detention aides and turnkeys "is attributable to intentional discrimination." *AFSCME*, 799 F.Supp. at 1409. The district court awarded the plaintiffs a judgment in excess of $1.6 million on that claim. Although AFSCME failed on its broader claim—that the County's entire pay scale was discriminatory—it is difficult to characterize as utterly meritless a lawsuit which resulted in a favorable

judgment of more than $1.6 million.[2] Certainly, a fee award might be warranted if one or more frivolous claims are accompanied by an unrelated claim that is meritorious. But the claim on which AFSCME prevailed was closely related to its other claims, and it was substantial by most measures. Under these circumstances, an award of fees was unwarranted under the *Christiansburg* standard, and the district court therefore abused its discretion in granting fees to the County.

CONCLUSION

The judgments of the district court awarding the County attorney's fees and expert witness fees are reversed.

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[2] The district court denied the County's motion to dismiss AFSCME's claims of unequal pay for equal work under the Equal Pay Act and denied the County's motion to dismiss AFSCME's disparate treatment claim under Title VII. *See AFSCME*, 609 F.Supp. at 707-11. The district court also denied the County's motion for directed verdict at the close of AFSCME's case. These rulings are in some tension with the finding that AFSCME's claims were frivolous. *See United States v. Mississippi*, 921 F.2d 604, 609 (5th Cir.1991) (district court's refusal to dismiss relevant to whether claim is frivolous); *Sullivan v. School Bd. Of Pinellas County*, 773 F.2d 1182, 1189 (11th Cir.1995) (same).

APPENDIX B

United States District Court

EASTERN DISTRICT OF NEW YORK

AMERICAN FEDERATION of STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO (AFSCME), et al.,
Plaintiffs,

-against-

COUNTY of NASSAU,
Defendant.

MEMORANDUM AND ORDER
84cv1730

GLASSER, United States District Judge:

BACKGROUND

The plaintiffs commenced this class action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, and pursuant to the Equal Pay Act of 1963, 29 U.S.C. §206(d), alleging that the County of Nassau "discriminates in compensation on the basis of sex by paying historically female job classifications which require an equivalent or lesser composite of skill, effort, responsibility and working conditions" less than historically male job classifications. Also

alleged were specific violations of the Equal Pay Act. The plaintiffs sought injunctive relief, back pay, liquidated damages, costs and attorneys fees.

Pre-trial motions resulted in the dismissal of the Equal Pay Act claims of specifically named plaintiffs; the dismissal of the Title VII claims of all plaintiffs predicated upon a disparate impact theory; and the dismissal of the Title VII claims of all male plaintiffs. Subsequently, the court certified a class and designated the class representatives. *See AFSCME v. Nassau,* 609 F.Supp. 695 (E.D.N.Y.1985) and 694 F.Supp. 64 (E.D.N.Y. 1987). A stipulation was then entered into bifurcating the liability aspect of the action. The trial of that aspect of the case began on November 27, 1989 and ended on May 11, 1990. This court held that plaintiffs failed to prove violations of Title VII or of the Equal Pay Act by a preponderance of the evidence as to all claims, except for the Title VII claims of the class members employed as police detention aids. *See AFSCME v. Nassau*, 799 F.Supp. 1370 (E.D.N.Y. 1992).

Thereafter, pursuant to 42 U.S.C. §1988, the defendants moved for an award of attorneys fees in the amount of $982,407.23 and expert witness fees in the amount of $550,974.66 as the prevailing party in the action. As this court previously noted, the statutory authorization for attorney's fees in this case is 42 U.S.C. § 20003-5(k) which provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, ... a reasonable attorney's fee (including expert fees) as part of the costs...

The provision for expert fees was added by the Civil Rights Act of 1991 by which Congress overruled the Supreme Court's decision in *West Virginia Univ. Hosps., Inc. v. Casey,* 499 U.S. 83 (1991). *See AFSCME v. Nassau,* 825 F.Supp. 468 (E.D.N.Y. 1993). This court awarded attorneys fees as available under Title VII in the amount requested but deferred ruling on the issue of expert witness fees in light of *Landgraf v. USI Film Prods.*, ___U.S.___, 114 S.Ct. 1483 (1994) which was then pending before the Supreme Court. *See* 825 F.Supp at 474. In the wake of the *Landgraf* decision, the parties submitted memoranda regarding the expert fee issue and this court now addresses this final component of this case.

DISCUSSION

In its last opinion in this case, this court noted:

> The resolution of the defendants' entitlement to recover fees paid to expert witnesses requires a determination of whether the amendment to 42 U.S.C. §2000e-5(k) contained in the Civil Rights Act of 1991, is retroactive. As of this date, the court would be bound to decide that it is not and that, therefore, expert witness fees are not recoverable. That decision would be required by *Wisdom v. Intrepid Sea-Air Space Museum,* 993 F.2d 5 (2d Cir. 1993), which adhered to the Second Circuit's prior decision in *Butts v. City of New York Dep't of Hous. Preservation and Dev.,* 990 F.2d 1397 (2d Cir. 1993), which held that the 1991 Act does not apply retroactively.

825 F.Supp. at 474. This position was premised upon the fact that "*Wisdom* makes it clear that it is immaterial whether the specific provisions of the 1991 Act in issue are substantive or procedural." *Id.*

In two recent cases the Supreme Court addressed the retroactive application of certain provisions of the 1991 Act. In one, the Court held that section. 102 of the statute, providing for jury trials and compensatory and punitive damages, does not apply retroactively. *Landgraf, supra*. In the other, it held that section 101 of the statute, defining the scope of the term to "make and enforce contracts," was also not retroactive. *Rivers v. Roadway Express, Inc.*, ___U.S.___, 114 S.Ct. 1510 (1994). Nevertheless, the Court explicitly reserved judgment on the possible retroactivity of the remaining provisions of the 1991 Act. The Court stated in *Landgraf*, U.S. at _, 114 S.Ct. at 1505:

> [T]here is no special reason to think that all the diverse provisions of the Act must be treated uniformly for such purposes. To the contrary, we understand the instruction that the provisions are to "take effect upon enactment" to mean that courts should evaluate each provision of the Act in light of ordinary judicial principles concerning the application of new rules to pending cases and preenactment conduct.

The Court then discussed the "judicial principles" for courts to consider in light of its prior opinions regarding issues of retroactivity in *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1974), and *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204

(1988).[1] As a general proposition, the retroactive application of substantive legal requirements is frowned upon. This principle is reflected most clearly in the Ex Post Facto Clause, U.S. Const. Art. I, Sec. 9, as well as other provisions of the Constitution which are meant to rein in "[t]he Legislature's unmatched powers [which] allow it to sweep away settled expectations suddenly and without individualized consideration." *See* 114 S.Ct. at 1497.

With respect to procedural matters and prospective remedies, retroactive application is not viewed as unfairly upsetting settled expectations and is, therefore, permissible. *Id.*, at 1501-1502. In the course of its discussion, the Court addressed the nature of attorney's fee awards. The Court reaffirmed Bradley[2] and stated that "[a]ttorney's fee determinations ... are 'collateral to the main cause of action'

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[1] In Bradley, at pg. 711, the Court held that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." In Bowen, at pg. 208, the Court stated that [r]etro-activity is not favored in the law. Thus, congressional enactments... will not be construed to have retroactive effect unless their language clearly requires this result." Yet, *Bowen* did not overrule, or even refer to, *Bradley*. *See Butts*, 990 F.2d at 1409.

[2] The Court stated, at pg. 1503:
Although [there is language in Bradley, at pg. 711, which] suggests a categorical presumption in favor of application of all new rules of law, we now make it clear that Bradley did not alter the well settled presumption against application of the class of new statutes that would have genuinely "retroactive" effect... [T]he attorney's fee provision at issue in *Bradley* did not resemble the cases in which we have invoked the presumption against statutory retroactivity.

and 'uniquely separable from the cause of action to be proved at trial.'" 114 S.Ct. at 1503 (citations omitted). It is upon this basis that defendants contend that they are entitled to an award of expert witness fees. They contend that such fees should be properly viewed as collateral relief whose retroactive application is authorized by *Landgraf*. Plaintiffs, on the other hand, contend that while *Landgraf* does not automatically bar retroactive application of the expert witness fee provision, it also does not overrule Second Circuit precedents against retroactive application of the 1991 Act as reflected in *Wisdom*, 993 F. 2d 5, and *Butts v. City of New York Dep't of Housing*, 990 F.2d 1397 (2d Cir. 1993).[3]

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[3] Plaintiffs also contend that while *Landgraf* did describe attorney's fees as collateral relief the same cannot be said of expert witness fees. They correctly note that the Court's discussion focused upon its prior opinion in *Bradley, supra*, in which the Court stated that the awarded attorney's fees was retroactively available due to the "prior availability of a fee award... under pre-existing theories [which thus] 'did not impose an additional unforeseeable obligation'" upon the losing party. 114 S.Ct. at 1503.

The language added to §2000e-5(k) was clearly inserted in response to *West Virginia Univ. Hosps.*, 499 U.S. 83. But that opinion addressed the recovery of fees under 42 U.S.C. §1988, not Title VII. While it is true that the standards applied to each of these civil rights statutes is generally the same, *see Hensley v. Eckerhart*, 461 U.S. 424, 433 fn.7 (1983), one might utilize the absence of a direct proscription of Title VII expert witness fee awards to suggest the prior availability of expert witness fees under an alternative pre-existing theory. Such an alternative theory might be the court's equitable powers to award fees to a successful party when his opponent has acted in bad faith, vexatiously, or wantonly. *See Kanematsu-Gosho Ltd. v. M/T Messiniaki Aigli*, 814 F.2d 115, 119 (2d Cir. 1987). In light of this court's prior observation of the extreme

Given the infancy of the *Landgraf* opinion, it is not surprising that there are as of yet few Second Circuit opinions which address its impact upon prior Circuit case law. In a brief footnote in *Sands v. Runyon*, 28 F.3d 1323, 1333 fn.3 (2d Cir. 1994), the court stated that with respect to the 1991 Act, "[t]he Supreme Court recently held against retroactivity, thereby confirming what has been the settled law of this Circuit." More informative, is the Court of Appeals' recent opinion in *Vernon v. Cassadaga Valley Cent. Sch. Dist.*, 49 F.3d 886 (2d Cir. 1995).

In Vernon, the court addressed a question of first impression in this Circuit, namely whether the 90 day statute of limitations enacted by the 1991 Act for ADEA[4] actions applied to suits filed after the enactment of the 1991 Act, but involving alleged

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weakness of plaintiff's case in connection with the award of attorney's fees, 825 F.Supp 472-474, perhaps this award is as appropriate to fulfill the purposes intended by Congress when it permitted cost shifting in the civil rights litigation context.

Alternatively, it may be appropriate to revisit the retroactive availability of expert fees as discussed by Judge Posner in *Freidrich v. City of Chicago*, 888 F.2d 511 (7th Cir. 1989). In that decision, rendered prior to *West Virginia Univ. Hosps.*, Judge Posner compellingly argued that the statutory language providing for the award of "a reasonable attorney's fee" . could not be read literally to exclude expert fee awards since it clearly was intended to include all necessary expenses incurred in properly litigating the case at hand. One might view Congress' insertion of expert fee language into Title VII via the 1991 Act as an adoption of Judge Posner's understanding of the statute — that "attorney's fee" includes expert fees; hence, the parenthetical notation in the amendment.

4 Age Discrimination in Employment Act of 1967, 29 U.S.C §626(e).

discrimination occurring before the Act's enactment. In the course of holding that the limitations period should apply to such cases, the court reviewed *Landgraf* as well as its prior opinions in *Wisdom and Butts* in light of *Landgraf*. With respect to *Landgraf*, the Second Circuit stated:

> [The Landgraf Court recognized that] "[e]ven absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations." ... 114 S.Ct. at 1501. Specifically, the Court noted that "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity," because individuals have diminished reliance interests in matters of procedure, and because rules of procedure affect secondary rather than primary conduct. ...114 S.Ct. at 1502. Thus, to determine whether a statute has retroactive effects, a court must ask "whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." 114 S.Ct. at 1505.

49 F.3d at 890. The court went on to hold that the limitations provision should apply retroactively since "[t]he conduct to which [it] applies is not the primary conduct of the defendants, the alleged discrimination, but is instead the secondary conduct of the plaintiffs, the filing of their suit." *Id.*

Importantly, the court viewed this holding as consistent not only with *Landgraf*, but with its decisions in *Wisdom and Butts* as well. The court emphasized that those cases "are fully consistent" with its analysis since "*Landgraf* and other cases countenance treating statutes of limitations differently from statutory provisions that affect substantive rights, like those at issue in *Butts* [(establishing a cause of action for racial discrimination in terms and conditions of employment)] and *Wisdom* [(providing for jury trial and damages in Title VII cases)]." 49 F.3d at 891.

The recovery of expert witness fees applies to secondary conduct of the parties — namely, litigation conduct, not the alleged acts of discrimination. Therefore, the provision for recovering expert fees — characterized in *Landgraf* as "collateral to the main cause of action and uniquely separable from the cause of action to be proved at trial" — is retroactively applicable in a manner analogous to the retroactive application of the limitations period discussed by the court in *Vernon*. See also *Shipes v. Trinity Indus.*, 31 F.3d 347 (5th Cir. 1994). Applying the 1991 Act's provision retroactively "impaired no rights possessed by either party, increased neither party's liability, nor imposed any new duties with respect to past transactions." *Vernon*, 49 F.3d at 890. Rather, it serves a basic purpose of fee shifting statutes; "to deter the bringing of lawsuits without foundation by providing that the 'prevailing party' — be it plaintiff or defendant — could obtain legal fees." See *AFSCME*, 825 F.Supp. at 470 (quoting *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 420 (1978)(internal citations omitted)).

I am not persuaded that an award of expert witness fees would cause a manifest injustice to the plaintiff. In the presentation of its case, the plaintiff relied extensively upon the studies and testimony of expert witnesses who were paid handsomely for their services. As Judge Posner cogently observed in *Freidrich v. City of Chicago*, 888 F.2d at 514:

> Experts are not only hired to testify; sometimes they are hired, also or instead, to educate counsel in a technical matter germane to the suit. The time so spent by the expert is a substitute for lawyer time,... for if prohibited (or deterred by the costs) from hiring an expert the lawyer would attempt to educate himself about the expert's area of expertise. To forbid the shifting of the expert's fee would encourage underspecialization and inefficient trial preparation...

The plaintiff surely knew when the suit was filed that the defendant would be similarly be compelled to hire experts for the intelligent preparation of its case.

If an intervening rule concerning attorney's fees was a procedural rule "collateral to the main cause of action" and "uniquely separable from the cause of action to be proved at trial," *Landgraf*, ___U.S. at___ , 114 S.Ct. at 1503, and if "the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule... retroactive," *Landgraf*, ___ U.S. at___ , 114 S.Ct. at 1502 (footnote omitted)(citations omitted), then surely the provision for the expert witness fees is a procedural rule

regulating secondary rather than primary conduct and the application of that provision does not offend principles of retroactivity.

CONCLUSION

In light of the foregoing reasons, defendants' motion for an award of expert witness fees is granted. Defendants are awarded their requested amount of $550,974.66.

SO ORDERED.

Dated: May 31, 1995
Brooklyn, New York

/Signature/
United States District Judge

APPENDIX C

825 FEDERAL SUPPLEMENT

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO (AFSCME), et al.,

Plaintiffs,

v.

COUNTY OF NASSAU, et al.,

Defendants.

No. CV-84-1730.

United States District Court, E.D. New York

June 24, 1993.

County which prevailed on most Title VII and Equal Pay Act claims against it, 799 F.Supp. 1370, filed a motion for an award of attorney fees. The District Court, Glasser, J., held that: (1) county was entitled to award of attorney fees in the interest of justice, and (2) requested fee of $982,407.23 was reasonable.

Motion granted.

1. Civil Rights k 298, 415

County which prevailed on most of the Title VII and Equal Pay Act claims against it was entitled to award of prevailing party attorney fees; plaintiffs' proof fell far short of the mark in their attempt to show discriminatory intent by county on theory that county's job titles were segregated by sex, and real

plaintiff in the case was a major union and dominant force on American labor scene, which was not economically or otherwise disadvantaged. Fair Labor Standards Act of 1938, § 6(d), 29 U.S.C.A. § 206(d); Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1988.

2. Civil Rights k 299

In determining request for attorney fees by prevailing defendant in civil rights actions, touchstones to determining that action was frivolous, without foundation or unreasonable, could only be found in context of litigation as a whole. 42 U.S.C.A. § 1988.

3. Civil Right k 302, 418

Defendant which prevailed on most Title VII and Equal Pay Act claims against it in complex litigation was entitled to reasonable attorney fee of $982,407.23 based on contemporaneous time records; case was complex, involving more than 19,000 employees and approximately 150 job titles, classification evaluation extended over three years, and trial lasted over three months with thousands of pages of exhibits. 42 U.S.C.A. § 1988.

Joel I. Klein, Klein, Farr, Smith & Taranto, Washington, DC, for plaintiffs.

William H. Pauley III Snitow & Pauley, New York City, for defendants.

MEMORANDUM AND ORDER

GLASSER, United States District Judge:

The plaintiffs commenced this class action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and pursuant to the Equal Pay Act of 1963, 29 U.S.C. § 206(d), alleging that the County of Nassau "discriminates in compensation on the basis of sex by paying historically female job classifications which require an equivalent or lesser composite of skill, effort, responsibility and working conditions" less than historically male job classifications. Also alleged were specific violations of the Equal Pay Act. The plaintiffs sought injunctive relief, back pay, liquidated damages, costs and attorney's fees.

Pretrial motions resulted in the dismissal of the Equal Pay Act claims of specifically named plaintiffs; the dismissal of the Title VII claims of all plaintiffs predicated upon a disparate impact theory; and the dismissal of the Title VII claims of all male plaintiffs. Subsequently, the court certified a class and designated the class representatives. *See A.F.S.C.M.E. v. Nassau County*, 609 F.Supp. 695 (E.D.N.Y.1985) and 664 F.Supp. 64 (E.D.N.Y. 1987). A stipulation was then entered into bifurcating the liability aspect of the action. The trial of that segment began on November 27, 1989 and ended on May 11, 1990. In an opinion reported in 799 F.Supp. 1370 (E.D.N.Y.1992), the court held that the plaintiffs failed to prove violations of Title VII or of the Equal Pay Act by a preponderance of the evidence as to all claims, except for the Title VII claims of the class members employed as police detention aides.

Thereafter, the defendants moved this court for an order pursuant to 42 U.S.C. § 1988 awarding them reasonable attorney's fees in the amount of $982,407.23 and expert witness fees in the amount of $550,974.66 as the prevailing party in the action. More precisely, the statutory authorization for the recovery of attorney's fees in this case is 42 U.S.C. § 2000e-5(k) which provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, ... a reasonable attorney's fee (including expert fees) as part of the costs ...

The provision for expert fees was added by the Civil Rights Act of 1991 by which Congress overruled the Supreme Court's decision in *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 111 S.Ct. 1138, 113 L.Ed.2d. 68 (1991). The issue of expert fees will be addressed after the court determines whether an allowance of reasonable attorney's fees to the defendants may be made.

Although the statute as it emerged from Congress provides for the discretionary award of a reasonable attorney's to "*the prevailing party*" without distinguishing between the plaintiff and the defendant as the prevailing party, the Court engrafted such a distinction upon it in *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d. 648 (1978). The question in that case was "what standard should inform a district court's discretion in deciding whether to award attorney's fees to a successful *defendant* in a Title VII action." *Id.* at 417, 98 S.Ct. at 698. The Court acknowledged that the legislative history of § 2000e-5(k) was sparse. Brief references

to the remarks of three Senators in the legislative debates led to the observation that:

> If anything can be gleaned from these fragments of legislative history, it is that while Congress wanted to clear the way for suits to be brought under the Act it also wanted to protect defendants from burdensome litigation having no legal or factual basis.

Id. at 420, 98 S.Ct. at 700. The Court noted that:

The Court of Appeals for the District of Columbia Circuit seems to have drawn the maximum significance from the Senate debates when it concluded:

> [From these debates] two purposes for § 706(k) emerge. First, Congress desired to "make it easier for a plaintiff of limited means to bring a meritorious suit" ... But second and equally important, Congress intended to "deter the bringing of lawsuits without foundation" by providing that the "prevailing party"—be it plaintiff or defendant—could obtain legal fees. *Grubbs v. Butz*, 179 U.S.App.D.C. 18, 20, 548 F.2d 973, 975.

Christiansburg, 434 U.S. at 420, 98 S. Ct. at 700.

The federal appellate courts which had previously considered the question had decided that a fee award could not be made to a prevailing defendant if the action had not been "unfounded, meritless, frivolous or vexatiously brought." *See United States Steel Corp v. United States*, 519 F.2d 359, 363-64 (3rd Cir.1975); *see also, Bolton v. Murray Envelope*

Corp., 553 F .2d 881, 884 n. 2 (5th Cir.), *reh'g denied*, 557 F.2d 823 (5th Cir.1977); *Carrion v. Yeshiva Univ.*, 535 F.2d 722, 727 (2d Cir.1976). The formulation adopted by the Supreme Court was that:

> [A] plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so. And, needless to say, if a plaintiff is found to have brought or continued such a claim in *bad faith*, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense.

Christiansburg, 434 U.S. at 422, 98 S.Ct. at 701. The Court cautioned that:

> In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success.

Id. at 421-22, 98 S.Ct. at 700.

Given the sparse legislative history, perhaps the correct path for the Court to have followed would have been the one marked by the plain meaning of the statute derived from the unambiguous words "prevailing party." If Congress did not intend that the prevailing party—whether it be plaintiff or

defendant—could recover attorney's fees, it would have authorized fees only for one or the other. It is too late in the day, however, to gainsay the holding of *Christiansburg*. A consideration of the meaning of "frivolous," "unreasonable" or "groundless" and the extent to which those "abstract words can deal with concrete cases," *Christiansburg*, 434 U.S. at 421, 98 S.Ct. at 700, is, however, timely.

The application of those abstract words to this case can be made only with a familiarity of the findings of fact and conclusions of law which are reflected in the court's earlier opinion, reported at 799 F.Supp. 1370 (E.D.N.Y. 1992). Although that familiarity is assumed, selected portions of that opinion believed to be particularly relevant to the issue at hand, will be recalled. The plaintiffs' primary claim of a Title VII violation was that the defendants were guilty of intentional discrimination by systematically giving lower salary grades to predominately female job titles than they would have given if they were not female-dominated. They also claimed that there were sex-related salary disparities between male-dominated job titles and female-dominated job titles which were the result of intentional discrimination. Unable to present any direct evidence of intentional discrimination by the defendants, the plaintiffs sought to prove their allegations indirectly, through the testimony of two expert witnesses.

One of those experts, a sociologist from the University of California at Los Angeles was retained to study and report as to whether Nassau County applied it's own job evaluation system which was based on a management consultant study ("the Cresap study"), in a consistent way. The court's assessment of the testimony of that expert was as follows:

> [T]he court is unable to credit the testimony and the report of Dr. Treiman as to the conclusions of this study. First, the court found Dr. Treiman himself to be extremely evasive and not entirely credible throughout much of his testimony.... Second, Dr. Treiman, in a subsequent report, recanted part of his conclusions from this "unambiguous" evidence.... Further, the court found his methodology in the conduct of this graduate student exercise to be so flawed as to render it unreliable and of no probative value in this case.

799 F.Supp. at 1830.

The plaintiffs also sought to prove intentional discrimination by the defendants by yet another study by Dr. Treiman which they urged established that Nassau County could not have applied the Cresap evaluation procedures in good faith. The court's findings regarding this study are set out in 799 F.Supp. at 1381-83, one portion of which is particularly significant. The court found that Dr. Treiman had no data which he compiled in each of his studies, but used, instead, data prepared for him by the plaintiff's attorneys or their paralegals.

Another study was conducted by this expert with a view towards proving intentional discrimination in the job and salary evaluation process conducted on behalf of Nassau County by a management consulting firm (the Cresap study). The conclusions he reached in this study were also found to be unreliable for the reasons that:

> [T]he questionable—and poorly verified—assumptions on which that study is based as well as the flawed methods with which it was executed erode completely what little confidence this court might have had in Dr. Treiman's conclusions after observing his testimony. This court credits neither Dr. Treiman's testimony nor the results of his "training and experience" analysis.

799 F.Supp. at 1385.

As regards a document upon which much reliance was placed by the plaintiffs, Pl.'s Ex. 616/616–A, the court found "it more than a little remarkable that so much expert time and so much expert money were devoted to [its] exegesis... —a document of obscure content and of dubious significance." 799 F.Supp. at 1391. The court also found Dr. Treiman's analysis of that document to be of no probative value and to provide no basis for concluding that the defendants intentionally discriminated in the execution of the job and salary evaluation process. 799 F.Supp. at 1390.

The second expert witness upon whom the plaintiffs placed significant reliance was an economist who testified frequently in Title VII actions: Dr. Stephen Michelson. This expert was found to be as evasive as the other expert, and his methodological shortcomings precluded the court from according his conclusions more than minimal weight. *See* 799 F.Supp. at 1397-1402. The reasons for the court's conclusions were:

> His study reveals serious methodological flaws: He failed to record significant decisions in his coding process; indeed, combined with the fact

> that he claimed to be unable to recall instructions to his staff, that failure to preserve his methodology frustrated this court in attempting to assess the trustworthiness of his "exacting model." Further, he selectively departed from his own "rules" as to coding job specifications; he made trivial terminological distinctions in some cases and failed to evaluate his work against common sense in others.... [H]e took no account of such salary determinants as the collective bargaining process and working conditions—the latter of which is a factor that employees of the Nassau County Civil Service Commission testified was significant in the [job and salary evaluation] process and has been significant ever since. Finally, Dr. Michelson's multiple regression analysis, with over seventy independent variables, completely ignored the forces of the market despite the fact that there was ample testimony as to the significance of the market in salary decisions....

799 F.Supp. at 1401-02.

In its concluding comments, upon the worth of the experts' reports and of their testimony, the court wrote:

> The testimony of the plaintiffs' experts and the reports they prepared were not the proffers of detached scholars in the fields of economics, statistics and sociology who were motivated by the sole purpose of assisting the finder of facts with an objective evaluation of the relevant data; rather, they were the proffers of partisans. When

> expert witnesses become partisans, objectivity and scholarship are sacrificed to the need to prevail. Testimony which is prompted by that need and by that goal may deprive worthy plaintiffs of the relief that may be properly due them, or it may wreak havoc upon the reputation and the financial condition of defendants. A ready solution for the prevention or immunization of such abuses is not at hand. It may be that the only remedy is the vigorous and incisive cross-examination of experts which Wigmore characterized as "beyond any doubt the greatest legal invention ever invented for the discovery of truth." 5 Wigmore, *Evidence* § 1367 (Chadbourn rev. 1974).

799 F.Supp. at 1417.

In pondering the just disposition of this motion, the court revisits that observation and cogitates upon the idea that perhaps the only remedy is not a vigorous cross-examination, but that an award of reasonable attorney's fees may also serve to prevent or minimize the abuses. The plaintiffs attempted to prove discriminatory intent by undertaking to demonstrate that job titles in Nassau County were segregated by sex and by offering anecdotal evidence of such intent. The proof they offered in this regard fell considerably short of the mark. *See* 799 F.Supp. at 1404-06.

Returning to an earlier inquiry, can the abstract words—frivolous, unreasonable or without foundation—be applied to this concrete case? Mindful of the teaching to avoid the "temptation to engage in *post hoc* reasoning by concluding

that because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation," *Christiansburg,* 434 U.S. at 421-22, 98 S.Ct. at 700, what touchstones, excluding *post hoc* reasoning, point the way with assurance to the conclusion that an action was frivolous, unreasonable or without foundation? Resorting to the lexicographer's understanding of those words would be to ignore another teaching, namely, that "it is one of the surest indexes of a well and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell v. Markham,* 148 F. 2d 737, 739 (2d Cir.1945) (L. Hand, J.), *aff'd,* 326 U.S. 404, 66 S.Ct. 193, 90 L.Ed. 165 (1945). The purpose of the statute would not be in doubt were words to be given their plain meaning. Congress would appear to have wanted not only "to clear the way for suits to be brought under the Act, [but] also... to protect defendants from burdensome litigation," *Christiansburg,* 434 U.S. at 420, 98 S.Ct. at 700, "by providing that the 'prevailing party'—be it plaintiff or defendant—could obtain legal fees." *Grubbs v. Butz,* 548 F.2d 973, 975 (D.C.Cir.1976). A "sympathetic and imaginative discovery," however, yielded another purpose which was not to permit a routine allowance of attorney fees to successful defendants to effectively discourage suits in all but the clearest cases and to inhibit earnest advocacy. *Carrion v. Yeshiva Univ.,* 535 F.2d 722, 727 (2d Cir.1976). This judicial gloss applied to the plain meaning of the statute provides eloquent corroboration of Justice Frankfurter's observation that "[i]n matters of statutory construction... it makes a great deal of difference whether you

start with an answer or with a problem." Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum.L.Rev. 527, 529 (1947).

[1] It is the view of this court that the allowance of attorney's fees to these successful defendants would not frustrate the purpose of the Act but would further it. This is not the case in which a modestly salaried employee or group of employees unsuccessfully sought to vindicate a colorable civil right as private attorneys general against a defendant with vastly superior economic resources. The award of attorney's fees to the prevailing defendant in such a case would, understandably, frustrate the purpose of the Act. This is the case in which the real plaintiff, a major union and a dominant force on the American labor scene, the American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME) was not economically or otherwise disadvantaged. For example, it had paid just one of its experts over $850,000 in fees even before the trial began. 799 F.Supp. at 1395. It was represented by very able and experienced counsel who impressed the court with their exquisite grasp of statistics, regression analyses, and masses of complex, computer-generated tables. It is easy to imagine that the plaintiffs could have trapped a victory in the web of statistical data spun by their expert witnesses were it not for a very able and experienced defense counsel who too mastered the statistics, regression analyses and complex computer data which enabled him to expose the deficiencies both in the experts' testimony and in the studies upon which the plaintiffs so heavily relied.

[2] The touchstones to a determination that an action was frivolous, without foundation or unreasonable in a case such

as this can only be found in the context of the litigation as a whole. The obvious criticism of this view is that it implicates precisely the *post hoc* reasoning district courts are cautioned to avoid. The response to that criticism is that it is the duty of a court to bring the law into accordance with experience and justice. *See, e.g., Funk v. United States,* 290 U.S. 371, 382, 54 S.Ct. 212, 215, 78 L.Ed. 369 (1933). The thought was expressed more felicitously in *United Australia Ltd. V. Barclay's Bank, Ltd.,* (1941) A.C. 1, 29, *quoted in Woods v. Lancet,* 303 N.Y. 349, 355, 102 N.E.2d 691, 694 (1951), as follows: "When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course of the judge is to pass through them undeterred." Those stirring reminders that the validity of a rule is not to be accepted because it was so in the reign of Henry VIII and that the mechanical application of catch phrases can keep analysis in fetters for generations are peculiarly apt as regards the inflexible, sterile application of the "*post hoc*" pronouncement.

"The life of the law has not been logic; it has been experience." Holmes, *The Common Law* 1 (1848). Experience teaches that in a case as complex as this the establishment of a *prima facie* case is a meaningless indication of whether the case is frivolous, unreasonable or without foundation. At the pleading stage a court may dismiss a complaint under Rule 12(b)(6), Fed.R.Civ.P., only if, after accepting the material facts alleged in the complaint as true, it still appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); *Easton v. Sundram,* 947 F.2d 1011, 1014-15 (2d Cir.1991),

cert. denied, — U.S. —, 112 S.Ct. 1943, 118 L.Ed.2d 548 (1992). Experience also teaches that in a case as complex as this—involving more than 19,000 employees in approximately one hundred and fifty job titles; a classification evaluation that extended over three years (the Cresap study); and a trial over a period of three months with thousands of pages of abstruse exhibits—it would be irresponsible to rule on a motion to dismiss at the end of the plaintiffs' case without an opportunity to make a detached evaluation of the voluminous evidence. Experience also teaches, that in a case as complex as this, an intelligent appraisal of the *Christiansburg* standards can only be made after the dust of the litigation battle has settled and after the smoke from the defense salvos has cleared. Such a critical appraisal has been made and memorialized in 799 F.Supp. 1370 (E.D.N.Y. 1992). The conclusion that the defendant is entitled to a reasonable attorney's fee is not a surrender to the temptation to engage in *post hoc* reasoning that because the plaintiff lost his action, it must have been unreasonable and without foundation. Rather, that conclusion is based precisely upon the findings of fact made with a kaleidoscopic view of the entire case which was possible only from the vantage point of time. It was that view which leaves the court secure in holding that the plaintiffs' pursuit of their claims was unreasonable and without foundation and that the award of fees to the prevailing defendants protect them from burdensome litigation.

[3] Having decided that the defendant is entitled to a reasonable attorney's fee, the court finds that the fee of $982,407.23 requested is reasonable and that Exhibit H to the Reply Declaration of William H. Pauley III, being the contemporaneous time records upon which that request is

based, satisfies the requirement of *New York State Association for Retarded Children v. Carey*, 711 F.2d 1136 (2d Cir.1983). The plaintiffs' Memorandum in Opposition to Defendants' Motion does not challenge the reasonableness of the fee request, nor could they do so credibly. Having more than a passing familiarity with the complexity of this litigation both procedurally and substantitively and with the quality of the representation provided by defendants' counsel, the court would unhesitatingly hold that the fee request is not only reasonable, but modest.

Expert Witness Fees

The resolution of the issue of the defendants' entitlement to recover fees paid to expert witnesses requires a determination of whether the amendment to 42 U.S.C. 2000e-5(k), contained in the Civil Rights Act of 1991, is retroactive. As of this date, the court would be bound to decide that it is not and that, therefore, expert witness fees are not recoverable. That decision would be required by *Wisdom v. Intrepid Sea-Air Space Museum*, 993 F.2d 5 (2d Cir.1993), which adhered to the Second Circuit's prior decision in *Butts v. City of New York Dep't of Hous. Preservation and Dev.*, 990 F.2d 1397 (2d Cir.1993), which held that the 1991 Act does not apply retroactively. *Wisdom* makes it clear that it is immaterial whether the specific provisions of the 1991 Act in issue are substantive or procedural. In deciding *Wisdom*, the Court of Appeals was aware that the Supreme Court granted certiorari to hear the issue of retroactivity in *Harvis v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir.1992), *cert. granted in part sub nom. Landgraf v. USI Film Prods.*, — U.S. —, 113 S.Ct. 1250, 122 L.Ed.2d 649 (1993) and *Landgraf v. USI Film Prods.*, 968

F.2d 427 (5th Cir.1992), *cert. granted in part,* — U.S. —, 113 S.Ct. 1250, 122 L.Ed.2d 649 (1993). Notwithstanding that awareness, the Court of Appeals deemed itself bound by its prior opinion in *Butts* absent a change in the law by a higher authority.

In *Huntington Branch NAACP v. Town of Huntington,* 749 F.Supp. 62 (E.D.N.Y.1990), this court had before it an application for expert witness fees at a time when the propriety of awarding such fees was pending before the Supreme Court in *West Virginia Univ. Hosps., Inc. v. Casey,* 499 U.S. 83, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991). Notwithstanding that awareness the court granted the application for such fees, quoting Judge Learned hand in *Spector Motor Serv. v. Walsh,* 139 F.2d 809, 823 (2d. Cir.1943), *vacated sub nom. Spector Motor Serv. v. McLaughlin,* 323 U.S. 101, 65 S.Ct. 152, 89 L.Ed. 101 (1944), who wrote that it is not desirable

> for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant; on the contrary, I conceive that the measure of its duty is to divine, as best it can, what would be the event of an appeal....

749 F.Supp. at 68 (quoting *id*). In granting the application for expert witness fees in that case, the court discharged its duty and later learned that it did not correctly divine the event of an appeal: the award of such fees was precluded by the Supreme Court in *West Virginia Univ. Hosps., supra.* The Court of Appeals has also discharged its duty in *Wisdom.* Although this court has no reason to expect that the Court of Appeals will not fare better in divining the decision of the Supreme Court,

it believes the more prudent course would be to await that decision. A determination of the expert witness fee issue will, therefore, be deferred pending that event.

SO ORDERED.

APPENDIX D

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, (AFSCME); the Civil Service Employees Association, Inc., Region I/Local 1000, (CSEA); Rita Wallace, Rachel Braver, Dorothy Garage, Linda Kelly, and Lois Whitely on behalf of themselves and all others similarly situated, Plaintiffs,

v.

COUNTY OF NASSAU; its County Executive; the Comptroller; the Members of the County Board of Supervisors; and the Members of the Civil Service Commission, Defendants.

No. CV-84-1730.

United States District Court, E.D. New York.

Aug. 24, 1992.

Female employees of county filed class action, claiming violations of Title VII and the Equal Pay Act in connection with salary differentials. After a bench trial, the District Court, Glasser, J., held that: (1) the female employees failed to establish the discriminatory motive element of a disparate treatment claim; (2) communications workers and clerical workers failed to establish a violation of the Equal Pay Act; and (3) female police detention aides demonstrated that they performed substantially equal work as that performed by male turnkeys and, thus, established an Equal Pay Act and a Title VII violation in their rates of pay.

Judgment accordingly.

[1] CIVIL RIGHTS k 153, 377

Proof of discriminatory intent is needed in disparate treatment employment discrimination action, although discriminatory intent may be inferred from mere fact of differences in treatment. Civil Rights Act of 1964, § 703(a), as amended, 42 U.S.C.A. § 2000e-2(a).

[2] CIVIL RIGHTS k 158

Employment discrimination class action challenging "pattern and practice" of discrimination requires proof that sex discrimination is standard operating procedure—regular, rather than unusual, practice of employer. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

[3] CIVIL RIGHTS k 161

Proof of discriminatory motive is essential in employment discrimination action brought under Gunther theory for sex discrimination in compensation involving departure from employer's wage-setting methodology with intent to treat female employees adversely. Civil Rights Act of 1964, § 703(h), as amended, 42 U.S.C.A. § 2000e-2(h).

[4] CIVIL RIGHTS k 161

Female employees failed to show that county violated Title VII in establishing its wage-setting methodology and, thus, could not establish that mere perpetuation of process that began before effective date of Title VII could be illegal discrimination; there was no evidence that county intentionally discriminated against women in setting wages

for male-dominated and female-dominated job titles either through initial wage-setting methodology or perpetuation of that process. Civil Rights Act of 1964, § 703(h), as amended, 42 U.S.C.A. § 2000e-2(h).

[5] CIVIL RIGHTS k 387

Evidence of intentional discrimination against women employed by county as police detention aides, to assist with female inmates at county jail, did not establish discrimination against women in all female-dominated county job titles; "isolated" or "sporadic" occurrences of discrimination against police detention aides did not form predicate for class-wide relief. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[6] CIVIL RIGHTS k 387

Multiple regression analysis conducted by county employees' expert did not demonstrate, even indirectly, any intentional discrimination by county in rates of pay for male-dominated and female-dominated job titles; statistical evidence did not include effect of labor market on current salaries in county and effect market variable would have on apparent sex-related disparity in salaries. Civil Rights Act of 1964, § 703(h), as amended, 42 U.S.C.A. § 2000e-2(h).

[7] CIVIL RIGHTS k 161

County's good-faith negotiation as to salaries for various job titles undermined any possible discriminatory intent in rates of pay for male-dominated and female-dominated job title. Civil Rights Act of 1964, § 703(h), as amended, 42 U.S.C.A. § 2000e-2(h).

[8] LABOR RELATIONS k 1511

Under Equal Pay Act, employer has burden of showing that any unequal pay is predicated on legitimate factor that is not sex-related, such as seniority, merit, or quantity of production. Fair Labor Standards Act of 1938, § 6(d)(1), as amended, 29 U.S.C.A. § 206(d)(1).

[9] LABOR RELATIONS k 1511

Discriminatory intent element of disparate treatment claim in employment discrimination action predicated upon inequality of pay for equal work may be inferred if employer fails to explain inequality. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fair Labor Standards Act of 1938, § 6(d)(1), as amended, 29 U.S.C.A. § 206(d)(1).

[10] LABOR RELATIONS k 1333

"Equal" jobs for purposes of Equal Pay Act need not be rigorously identical; rather, jobs held by male and female employees must be substantially equal as to requisite skill, effort, and responsibility. Fair Labor Standards Act of 1938, § 6(d)(1), as amended, 29 U.S.C.A. § 206(d)(1).

See publication Words and Phrases for other judicial constructions and definitions.

[11] LABOR RELATIONS k 1333

Female police communications operators who performed mostly work of clerk-typist did not perform substantially equal work as that performed by male fire communications technicians and, therefore, comparison of female police

communications operators' job performance and conduct to those of fire communications technicians did not establish violation of Equal Pay Act. Fair Labor Standards Act of 1938, § 6(d)(1), as amended, 29 U.S.C.A. § 206(d)(1).

[12] LABOR RELATIONS k 1333

Additional skill, knowledge and responsibility of fire communications technicians demonstrated that those jobs held by male employees were not substantially equal to job held by female police communications operator and, thus, the differing rates of pay did not violate Equal Pay Act, as predicate to violation of Title VII violation for disparate treatment in rates of pay for male and female employees. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fair Labor Standards Act of 1938, § 6(d)(1), as amended, 29 U.S.C.A. § 206(d)(1).

[13] CIVIL RIGHTS k 161

Skills required to serve as police detention aides who worked with female jail inmates and "turnkeys" who worked with male employees were substantially equal and, therefore, Equal Pay Act violation with respect to rates of pay for male and female county employees established disparate treatment in violation of Title VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Fair Labor Standards Act of 1938, § 6(d)(1), as amended, 29 U.S.C.A. § 206(d)(1).

Paul Smith and Joel I. Klein, Onek, Klein & Farr, Washington, D.C., for plaintiffs.

William H. Pauley, III, Snitow & Pauley, New York City, for defendants.

MEMORANDUM AND ORDER

GLASSER, District Judge:

This class action was brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and to the Equal Pay Act of 1963, 29 U.S.C. § 206(d). This court has jurisdiction pursuant to 42 U.S.C. § 2000e-5(f)(3), 29 U.S.C. § 216(b), and 28 U.S.C. §§ 1331 and 1343(3), (4). The named plaintiffs are: the American Federation of State, County and Municipal Employees, AFL-CIO, (AFSCME), an international labor union; the Civil Service Employees Association Inc., Region I/Local 1000, (CSEA), a regional affiliate of AFSCME which represents approximately 13,800 employees of the County of Nassau; and several female employees of the County of Nassau. These plaintiffs represent a class comprised of all women employed at any time since July 28, 1982 in a Nassau County civil service job title with respect to which at least 70% of the incumbents have been female. The defendants are the New York State County of Nassau, the Nassau County Executive, the Nassau County Comptroller, the members of the Nassau County Board of Supervisors, and the members of the Nassau County Civil Service Commission.

As filed, the first amended complaint alleged violations of Title VII and of the Equal Pay Act by the County as to its compensation system; more specifically, the unions and the individual plaintiffs alleged that the County "discriminates in compensation on the basis of sex by paying historically female

job classifications less than historically male classifications which require an equivalent or lesser composite of skill, effort, responsibility and working conditions." Amended Complaint ¶ 3(D). These allegations were advanced on behalf of a class "of all employees, male and female, employed within the applicable limitations period by the County of Nassau in historically female sex-segregated job classifications in the classified service." *Id.* ¶ 3(B). The complaint defined "historically female sex-segregated job classifications" as those "classifications in an occupational group or job family for which the entry level classification is or ever has been 70% or more female." *Id.* Further, the individual plaintiffs alleged specific violations of Title VII and of the Equal Pay Act. *Id.* ¶¶ 10-19. The amended complaint sought injunctive relief, back pay, liquidated damages, costs, and attorney's fees. *Id.* ¶ 24.

On motion of the defendants, this court on May 17, 1985 dismissed the Equal Pay Act claims of former plaintiffs Stephen Goldberg and Fred Jordan as well as the Equal Pay Act claim of plaintiff Lois Whitely; the court also dismissed the Title VII claims of all plaintiffs insofar as they sought relief under a disparate impact theory. *AFSCME v. County of Nassau,* 609 F.Supp. 695 (E.D.N.Y.1985). On July 13, 1987, this court dismissed the Title VII claims of all the male plaintiffs. The court also certified at that time a class comprised of all female employees of the County of Nassau who, since July 28, 1982, have worked in Nassau County civil service jobs that have ever had at least 70% female employees. The court designated the named individual plaintiffs and the two union plaintiffs to represent the class. The certification did not apply to the Equal Pay Act claims. *AFSCME v. County of*

Nassau, 664 F.Supp. 64 (E.D.N.Y.1987). Subsequently, named plaintiff Odessa Colvin dismissed her Title VII claims with prejudice, and named plaintiffs Laurie Gillibertie and Erna Fluhr were removed by stipulation.

The parties stipulated to bifurcate the trial for this action; the liability segment began on November 27, 1989 and concluded with final arguments on May 11, 1990. For the reasons indicated below in the findings of fact and conclusions of law made pursuant to Federal Rule of Civil Procedure 52(a), this court holds that the plaintiffs have failed to prove violations of Title VII or of the Equal Pay Act by a preponderance of the evidence as to all claims except the Title VII claims of the class members employed as police detention aides. Accordingly, judgment shall be entered for the defendants on all other claims.

FINDINGS OF FACT

I. The Nassau County Compensation System

In order to consider the plaintiffs' claims of sex discrimination by the County of Nassau, it is necessary first to provide a coherent view of the system under which Nassau County classifies jobs, determines salaries, and incorporates changes into its compensation system. Accordingly, these findings of fact must begin with an overview of the present structure of the Nassau County compensation system; further, it is necessary to review the process by which the present system was created as well as the manner in which it has been modified since its inception.

One significant terminological observation must be made at the outset: The parties and the witnesses at trial employed the terms "female-dominated" to refer to job titles for which 70% or more of the incumbents are women, "male-dominated" to refer to job titles for which 70% or more of the incumbents are men, and "mixed" to refer to job titles that are neither female-dominated nor male-dominated. Although counsel at times introduced confusion as to whether or not they were observing rigorous distinctions in their phraseology (see, e.g., Plaintiffs' Post-Trial Brief at 1: counsel appear to equate the term "female-dominated" with "predominantly female") the court will, for the sake of clarity, use the terms "female-dominated", "male-dominated", and "mixed" only as defined above. As used by the court, the terms "female-dominated" and "predominantly female" are not equated; as used by counsel, the possibility of equivalence between such phrases as "predominantly female" and "female-dominated" must be discerned from context.

A. Overview: The Present Structure

Nassau County, New York, employs over 19,000 people in approximately 1,500 job titles. As with all local governments in the State of New York, employment by the County is regulated through the New York State Civil Service Law. The Civil Service System—administered by the Nassau County Civil Service Commission—divides county employees into "classified" and "unclassified" service. Tr. 1231. "Unclassified" positions are those of elected officials, department heads, and board members. "Classified" positions—the vast majority of County jobs—are subdivided into an "exempt" class, a "competitive" class, a

"non-competitive" class, and a "labor" class. Tr. 1231. The "exempt" class is generally comprised of deputy commissioners and of certain professionals. The "labor" class is that for which no training or experience requirements are established. The "non-competitive" class is that for which training and experience requirements are established but for which examinations are impracticable. Tr. 1231-32. Positions in non-competitive jobs are filled by discretionary hiring at individual County departments—subject to confirmation by the Civil Service Commission that the hired applicant satisfies the training and experience requirements for the particular position. Tr. 1257-58. Finally, the "competitive" class (in which the greatest number of Nassau County jobs are found) is that for which competitive examinations are required by the New York State Civil Service Law. Tr. 1230-33. The Civil Service Commission posts and distributes notices of forthcoming examinations. Tr. 1254; see, e.g., DX UUU-4. Pursuant to state law, open positions in a competitive job must be filled from an "eligibility list" of applicants compiled and ranked on the basis of examination results. Tr. 1233. Candidates on the list must be selected in a modified rank order; that is, any open position must be offered to one of the top three eligible applicants. Tr. 1249. This is known commonly as the "one-in-three" rule. Tr. 1249.

The salaries of Nassau County employees are determined by job titles and by seniority. All job titles other than those of police personnel and of college faculties—and other than those which are either unclassified or exempt—are assigned to one of 27 salary "grades." PX 672. The minimum and maximum salaries for a particular grade are identical for all job titles at that grade. Further, an employee within a job title

progresses through regular salary "steps" in a given grade; progression from one step to another is grounded on seniority. Tr. 1311-12. However, the number of steps through which a particular employee moves in the grade for her job title is not the same for all employees; rather, it is dependent on the first date of the employee's tenure with the County. Employees who were hired on or before June 30, 1967 move through seven steps for their grades ("Plan A"); employees who were hired after June 30, 1967 but on or before December 31, 1976 also move through seven steps for their grades ("Plan B"); and employees who were hired on or after January 1, 1977 have 15 steps for their grades ("Plan C"). DX ZZZ- 2; Tr. 1311-12.

Compensation at each grade and step has increased through the years pursuant to "across-the-board" pay increases negotiated in collective bargaining agreements between the County and the plaintiff CSEA (which represents most of the employees whose jobs fall within this salary grade system, Tr. 1301). Tr. 1310-11. Also, individual job titles are at times "upgraded" either through the collective bargaining process or through actions taken by the Nassau County Board of Supervisors on the recommendation of the Civil Service Commission. The Nassau County Civil Service Commission has primary responsibility for evaluating proposed job titles and for reevaluating job titles or salary grades that are sought to be modified. The Civil Service Commission may recommend such additions or changes, but final authority to create a new title or to change the title or the grade of an existing job rests with the Nassau County Board of Supervisors. However, without a recommendation from the Civil Service Commission, a proposed modification is, for all practical purposes, formally rejected.

B. The 1967 Cresap Process

The present compensation system of Nassau County is a direct descendant of a comprehensive job and salary evaluation process conducted on behalf of the County between 1964 and 1967 by the management consulting firm of Cresap, McCormick and Paget ("Cresap"). The objectives of the Cresap process were to provide a rational classification of County job titles and to establish equitable and competitive salaries. See PX 621 at I-1 (final report of Cresap to Nassau County, dated June 1966 and entitled: "Nassau County—A Proposed Salary Plan"); see PX 1104 at 2 (preliminary report of Cresap to Nassau County, dated September 1964 and entitled: "Nassau County: Salary Plan for County Employment"). Cresap determined the parameters and the methodology of the study, trained a team of four Nassau County employees to conduct the study, and exercised regular supervision over the project. PX 621, passim.

The job evaluation process began with the distribution of questionnaires to several thousand County employees. PX 621 at II-1; Tr. 295. The County team of four and the Cresap professionals then set out to create a taxonomy of County job titles and of job characteristics. PX 621 at II-1 to II-2; Tr. 298. To supplement the information provided through the questionnaires, the team members and the consultants conducted approximately 1,500 "desk audits"; these audits entailed interviews with employees, observation of their duties, and consultation with their supervisors. PX 621 at II-2; Tr. 362-66; but see Tr. 305. After all such information was gathered, the County team and the Cresap personnel together sorted jobs into occupational categories. Then, different jobs

within occupational categories were distinguished and demarcated by hierarchical job titles. PX 621 at II-2; Tr. 307. Thus, for example, the Cresap process ultimately proposed the related job titles of Probation Officer Trainee, Probation Officer I, Probation Officer II, Probation Officer Supervisor I, Probation Officer Supervisor II, Probation Officer Supervisor III, Deputy Director of Probation, and Director of Probation. PX 621. The County team set out approximately 650 such job titles or "job classes." Tr. 307.

Next, the County team was trained by Cresap to write job descriptions or job specifications for each of the titles so created. PX 621 at II-3; Tr. 308 and 310; see PX 620 (instruction guide prepared by Cresap for Nassau County team, dated July 1965 and entitled: "Nassau County Class Specification Writers' Manual"). These job specifications were intended to set forth the essential characteristics of each title. PX 621; PX 620. The format developed by Cresap for the job descriptions required the following information: (1) a general statement of the duties of the job title; (2) a statement of the complexity of the duties of the job; (3) a statement of the typical duties of the job; and (4) a statement of the qualifications—specifically, the knowledge, skills, abilities, and experience—necessary for the job title. PX 620 at 6-8. The job specifications were not intended to be exhaustive descriptions of each aspect of the job; rather, the specifications were to set out the salient features of the particular title and to distinguish that job from other positions. PX 620; Tr. 309 and 1245. The job descriptions so drafted by the County team were reviewed and re-written both by the team members and by the Cresap professional staff. Tr. 308, 316, and 1452.

After the job specifications were completed, all Nassau County employees were notified of the proposed job titles and job descriptions. PX 621 at II-4; Tr. 366-67. At that time, neither salaries nor salary grades had been assigned to these job titles; nonetheless, the employees were permitted to appeal the classifications of their jobs to an independent classification appeals board. PX 621 at II-4 to II-5; Tr. 367-68. The decisions of this appellate board were binding on the County. Tr. 367-68. Over one thousand employees ultimately sought such review of the job reclassifications. PX 621 at II-4.

The Cresap process also entailed the assignment of job titles to salary grades. Toward this end, the County team evaluated the final job specifications on the bases of four factors: (1) the knowledge and the skills required by the job; (2) the complexity and the variety of the duties of the job; (3) the responsibility for independent action; and (4) the responsibility for supervision. PX 619 at 4 (instruction guide prepared by Cresap for Nassau County team, undated and entitled: "Nassau County: Job Evaluation Handbook"); PX 621 at III-2 to III-3. Each member of the County team rated designated jobs on each of these four factors. Again, the results of this process were reviewed and revised by the entire team and by the consultants from Cresap. Tr. 331; Tr. 333.

The numerical values assigned to these four factors for each job title were then weighted and totaled. PX 621 at III-3 to III-4. Although the final report submitted by Cresap to the County does not identify any factor other than these four on which grades were assigned to job titles, it is clear that the County team and the Cresap personnel did consider other criteria in grading particular jobs. Tr. 319-25, 1462. For

example, the ultimate point scores for each title were revised in part on the basis of information gathered by the individual team members during the desk audit phase of the classification process. Tr. 322-23. Ultimately, ranges of total scores were organized to correspond to 27 salary grades set out by Cresap. PX 621 at III-4 to III-5. Thus, for example, if the total evaluation points of a particular title fell within the range of 336 to 370 points, that job was given a salary grade of nine; if the total points of a particular title fell within the range of 371 to 405 points, that job was given a salary grade of ten. PX 621 at III- 4.

Cresap also conducted a labor market survey as an aid to the salary determination aspect of the job evaluation process. Cresap collected salary data on 63 separate "benchmark" job classes from such public employers as the City of New York, Suffolk County, Westchester County, the State of New York, and the United States Government as well as from employers in private industry. PX 621 at IV-1 to IV-4; see also DX LLL-1. This labor market data was used primarily to develop "salary trend lines" by which to compare the salaries of Nassau County jobs with the market rates for similar positions. PX 621 at IV-5 to IV-6. Although the salary survey was conducted at the same time as the grading process, Tr. 1612, the final report submitted to the County by Cresap does not indicate that the labor market salary data were ever used by Cresap as a basis on which to adjust the proposed grade of any particular job title. See Tr. 1609-10. Rather, the data formed the basis for general comparisons of the salaries paid by Nassau County for job evaluation point ranges. Thus, for example, a salary trend line drafted by Cresap indicates that the salary for Nassau County jobs with an evaluation point total of 250 compares

favorably to the salaries offered by Suffolk County and by Westchester County for similar jobs; but the report does not specifically compare the salary offered by Nassau County for the particular job title of "Laborer I" with the salaries paid by those other counties for the job of "laborer." PX 621.

Nonetheless, it is clear from papers drafted by Cresap as early as 1964 that a primary objective of the reclassification and evaluation process undertaken by Cresap was to ensure that the salaries offered by the County would be competitive with those of nearby communities. PX 1104 at 2; see also Tr. 1448. It is also clear that Cresap regarded the results of its labor market survey as confirmation that the final proposed salary plan would guarantee the competitiveness of the County. Thus, Cresap concluded that "[a]t the upper range of positions, the minimum Nassau County salaries are as high as, or higher than, the salaries of all of the public jurisdictions to which the County is compared." PX 621 at IV-6. Similarly, "[a]t the middle range of positions, Nassau County salaries are higher than all but the New York City salary scale." PX 621 at IV-6. And, finally, "[a]t the lower range of positions, the Nassau County minimum salary is slightly higher than the other salaries shown." PX 621 at IV-6. These facts indicated to Cresap that "Nassau County is in a strong competitive position, compared with other public jurisdictions and with private industry." PX 621 at IV-6.

Cresap made its final report of proposed job title classifications and of proposed salary grades to the County in June of 1966. PX 621. The proposed grades for approximately 38 job titles were not included in the body of the report but were placed in an addendum dated June 15, 1966. These job

titles had not been initially proposed by Cresap, but they were created through the classification appellate process. Accordingly, Cresap assigned salary grades to these new titles and reported them to the County. PX 621 at addendum. As with the initial determination of new job classifications and job specifications, County employees were provided with an opportunity to seek review of their proposed salary grades before an independent salary review board. Tr. 368-69. Again, the determinations of this appellate board were binding on the County. Tr. 368-69. Over 1,000 employees sought such review. The final job titles and salary grades were enacted by Nassau County ordinance in May of 1967. PX 591; Tr. 369.

C. Modifications since the Cresap Process

The Cresap system has continued to be the primary framework for the classification and for the evaluation of new and existing jobs in Nassau County. At the time of this trial, the County had not replaced the basic Cresap structure, and the County has retained most of the original job classifications and salary grades adopted in 1967. Tr. 397-98. Three-quarters of present Nassau County employees work in job titles that were established by the Cresap process, and the pay grades of three-quarters of those employees have not changed since 1967. Tr. 629-30. The Executive Director of the Civil Service Commission from 1966 through the time of this trial, Adele Leonard, indicated that the Cresap process was the "seed" for the entirety of the present Nassau County job classification and compensation system. PX 1096 at 56. Indeed, there have been only three principal mechanisms by which the results of the Cresap process have been altered: (1) the creation of new job titles through the Civil Service Commission; (2) upgrades

of existing job titles through the Civil Service Commission; and (3) salary increases and upgrades through the collective bargaining process.

As to the first of these, when a Nassau County department requests the creation of a new classified position, the Civil Service Commission first reviews the request to ensure that the proposed title is not duplicative of an existing job. Tr. 1241-43. If tentative approval of the proposal is forthcoming, the Civil Service Commission establishes the new title and drafts a job specification; such specifications are intended to correspond in form and in function to those specifications originally drafted during the Cresap process. Information for the specifications is gathered from the requesting department, from other departments, and, at times, through a job audit that is similar to the desk audits of the Cresap process. Tr. 1243-45. The Civil Service Commission must formally adopt the new title specification. Tr. 1243- 45. The Civil Service Commission recommends the new title to the County Executive; the County Executive then refers the title to the Nassau County Board of Supervisors. Final approval for the creation of a new title is granted by the Board of Supervisors through enactment as ordinance. Tr. 1259.

However, Civil Service Commission personnel specialists who began working for the County after the Cresap process have not received the training in job evaluation and grading that was given to the Nassau County team at the time of Cresap; accordingly, the specifications of new titles are not assessed on the four-factor system used by Cresap and by the Nassau County team in the 1960s. Tr. 388-89. Rather, salary grades for new titles are fixed by comparing the job

specifications to those of existing County jobs. Tr. 389-90, 393, and 1282-84; see also PX 1096 at 10-13. In order to facilitate this assessment and comparison process, the Civil Service Commission personnel specialists have developed informal "rules of thumb"; thus, for example, a new position that requires a baccalaureate degree is typically—although not invariably—assigned a salary grade of ten. Tr. 391-92. These "rules of thumb" were developed by inferences from salary grades that were originally assigned through the Cresap process. Tr. 393. In evaluating new positions, the Civil Service Commission personnel specialists consider training and experience to be among the most significant factors. Tr. 1282; but see PX 1096 at 11. However, other criteria considered by the personnel specialists include recruitment difficulties, the working conditions for the new position, and the market rate for similar jobs. PX 1096 at 13-15, 57; Tr. 1246-1247. Again, the Board of Supervisors must enact by ordinance a proposed salary grade for a new job title. Tr. 402 and 1259.

As to formal upgrades through the Civil Service Commission, either an employee or the department in which that employee works may seek an upgrade of the employee's job title. DX UUU-1; Tr. 1259. Often, upgrades are sought because the duties of a particular title have changed over the years or because an employee is performing "out of title work"—that is, work beyond the scope contemplated by the specification for that title. Tr. 1261. The upgrade request—whether made by employee or by department—is reviewed by the Civil Service Commission; additional information concerning the job title may be sought by Civil Service Commission personnel specialists from the department heads. Tr. 1263 and 1285. Not infrequently,

Nassau County departments act as the primary advocates of their employees' desire for upgrades. Tr. 1264 and 1271.

The Civil Service Commission considers two principal factors in assessing upgrade requests: (1) significant changes in the duties of a job title; and (2) significant problems in recruitment or retention of employees in a job title. Tr. 403 and 1264-65. However, the Civil Service Commission also considers such factors as the working conditions of a title as criteria for upgrades. PX 1096 at 9. With respect to the retention-and-recruitment factor, the personnel specialists at the Civil Service Commission regularly undertake market surveys in order to determine whether salaries offered by the County are competitive with those of nearby communities. PX 1096 at 13-15; DX ZZZ-4 at 27. In some instances, the Civil Service Commission will seek to address recruitment or retention problems through means less extensive than an upgrade. For instance, the Civil Service Commission may authorize a department to hire new employees at a higher salary step than that at which new employees typically begin ("above-step hiring"), Tr. 1268 and PX 1096 at 60; or the Civil Service Commission may authorize mass promotions of employees in one title to a higher related title. Tr. 1271.

Finally, the Cresap system set in place in 1967 has also been modified through the vehicle of collective bargaining. Since 1969, the County and CSEA have entered into nine separate collective bargaining agreements. Tr. 1319. These agreements have at times provided for "across-the-board" wage increases; at times they have provided for higher wages for particular groups of employees. Tr. 1327-28; DX ZZZ-2 at 11. The County and CSEA have also entered into memoranda of

understanding that secured upgrades for particular job titles. Tr. 1318 and 1320-23. Throughout these negotiations, both the County and CSEA have relied extensively on labor market surveys. Tr. 1314-17, 1377, and 1389. Both AFSCME and the County conduct comprehensive labor market surveys in order to present persuasive arguments at the bargaining table that particular salary increases or upgrades should or should not be granted. Tr. 1377-79.

II. Evidence of Discrimination by Nassau County

With these findings as background, the court may now turn to its findings of fact on the ultimate issue in this case: whether or not the County of Nassau has intentionally discriminated against women in female-dominated jobs with respect to compensation. Although the plaintiffs pursued several theories at trial, they ultimately determined that their "primary claim in this case is that the defendants engaged in intentional discrimination by systematically giving to predominantly female job titles lower salary grades than they would have received if they were not female-dominated." Plaintiffs' Post-Trial Brief at 1. That is, the plaintiffs argue that, during the Cresap job evaluation process, the "County selectively departed from [its wage-setting] methodology in a deliberate effort to favor male-dominated job titles while disfavoring the most significant female-dominated titles." *Id.* at 3. Further, the plaintiffs argue that, since the Cresap process, this intentional discrimination in setting salary grades has been both perpetuated by the failure of the County to redress these selective discriminatory departures as well as repeated by the County in its classification and grading of new titles. In addition to the evidence regarding discrimination in the setting

of salary grades, the plaintiffs also sought to show that there are sex-related disparities between the current salaries of male-dominated job titles and of female-dominated job titles—and that those disparities are the product of intentional discrimination. Finally, other evidence presented on the question of discriminatory intent concerned such matters as sex segregation of County job titles and specific instances of discriminatory behavior. The defendants presented evidence on all these matters as well as evidence concerning Nassau County affirmative action plans and the collective bargaining process between the County and its employees. Thus, on the critical question of discriminatory intent, the court makes the following findings of fact.

A. Discrimination during the Cresap Process

The plaintiffs presented no direct evidence of intentional discrimination against women in female-dominated Nassau County jobs during the Cresap process. Rather, every witness who had participated in that job classification and evaluation project credibly denied that any decision or determination was made during the Cresap process on the basis of the sex of Nassau County employees. See, e.g., Tr. 348, 377, 435, 1455, and 1464. Every witness associated with the Cresap process denied that they even had data as to the number of women in any particular job title. See, e.g., Tr. 377, 1455, and 1610. Confronted with such testimony as to the absence of any intentional discrimination by the Nassau County personnel team or by the Cresap personnel, the plaintiffs sought to prove their allegations indirectly.

1. The "Graduate Student" Study

The first element of evidence presented by the plaintiffs as to discrimination by the County in the conduct of the Cresap process was a study conducted by one of the plaintiffs' expert witnesses, Dr. Donald J. Treiman. Dr. Treiman, a sociologist from the University of California at Los Angeles, undertook "to determine whether Nassau County had applied its own job evaluation system in a consistent way." PX 1074 at 14 (report of Dr. Treiman to plaintiffs, dated September 1989 and entitled: "Job Classification and Salary Setting in Nassau County, N.Y. 1966-1986"); see also Tr. 583. His objective was to simulate the second half of the Cresap process with unbiased evaluators of job specifications.

Dr. Treiman hired five graduate students to rate Nassau County job specifications on the bases of the four factors used during the Cresap process, Tr. 589; through this exercise, Dr. Treiman sought to replicate the Nassau County job evaluation process. Because his aim was to achieve "unbiased" ratings, he gave the graduate students no information as to the Nassau County personnel system, no information as to the sex composition of the jobs that they were to score, and no information as to the existence and nature of this action. PX 1074 at 14; see also Tr. 590. Dr. Treiman reported that the results of this rating exercise by the graduate students were "unambiguous." PX 1074 at 16. More specifically, Dr. Treiman found that:

> When ratings of 297 Nassau County jobs evaluated by three raters working independently are summed and averaged, and the resulting point scores plus whether the job is female-dominated

> are used to predict the salary grade assigned by Nassau County, it emerges that employees in female-dominated jobs are, on average 2.4 salary grades lower than employees in other jobs *with the same evaluated worth according to the criteria used in Nassau County.*

PX 1074 at 16 (emphasis in original); see also Tr. 584-85 and 591. In other words, Dr. Treiman found that the Cresap process had created a two-and-one-half grade disparity between female-dominated jobs and male-dominated jobs that were otherwise equivalent under the evaluation criteria used in the Cresap process. Dr. Treiman testified that he checked these results for consistency among his students, Tr. 591, and he testified that he regarded this study as a "neutral measurement" against which to assess the results of the Cresap job evaluation process. Ultimately, Dr. Treiman concluded that this graduate student exercise demonstrates that "C[resap] and Nassau County applied the C [resap] criteria in a way that systematically discriminated against jobs performed mainly by women" and that "the job evaluation scores [used by Cresap and by the County during the Cresap process] were systematically manipulated to achieve a pay hierarchy that corresponded closely to the pre-C[resap] hierarchy." PX 1074 at 16. Dr. Treiman concluded that the Nassau County team and the Cresap personnel had not applied the job evaluative criteria in a "good faith" manner. PX 1074 at 4.

However, the court is unable to credit the testimony and the report of Dr. Treiman as to the conclusions of this study. First, the court found Dr. Treiman himself to be extremely evasive and not entirely credible throughout much of his testimony. See, e.g., Tr. 643-46 and 787-89. Second, Dr. Treiman in a

subsequent report recanted part of his conclusions from this "unambiguous" evidence, see PX 1075 at 1. Further, the court found his methodology in the conduct of this graduate student exercise to be so flawed as to render it unreliable and of no probative value in this case.

Dr. Treiman hired five graduate students about whom he knew virtually nothing to perform this exercise. Tr. 758. After he discharged two of the students from the exercise (because he determined that they were not capable of satisfactory execution of the project), Dr. Treiman was left with only three raters for the study—two of whom were in the first semester of their first year of graduate studies. Tr. 758. Dr. Treiman gave the graduate students minimal guidance in the exercise. Tr. 771-72.

More significantly, although Dr. Treiman instructed the students to rate each of 325 job specifications on the four factors used in the Cresap process, he did not give the students any information as to the number of employees supervised by the incumbents of these job titles. Tr. 768-69. Dr. Treiman told these students to do the "best that they could" without that information—information that Dr. Treiman himself conceded was essential to scoring the "supervisory responsibility" factor. Tr. 769. Thus, Dr. Treiman's graduate students—his standard assessors against which the results of the Cresap process could be measured—were directed to improvise at least one-fourth of the data they needed for the project.

Next, Dr. Treiman instructed his students to spend no more than 50 to 60 hours on the evaluations. Tr. 761. The court cannot conceive that 50 to 60 hours devoted to this project could adequately replicate the efforts of the participants in the

Cresap process who spent months evaluating these jobs. See, e.g., Tr. 333. Indeed, it became clear at trial that the time allotted by Dr. Treiman was terribly inadequate for any but the most hurried completion of this project. Tr. 762-67. Finally, in contrast to the procedure used in the Cresap process through which differences in point ratings among members of the County team were discussed and resolved by consensus, Dr. Treiman simply "averaged out" the different point ratings assigned by his graduate students. Tr. 781. Taken together, these procedural deficiencies significantly undermine the value of the graduate student exercise as a simulation of the original Cresap process.

The results of this exercise confirm that—far from tracking the Cresap job evaluation process—the exercise was a study in poor guidance, incomplete information, and inadequate time. The graduate students' ratings were remarkably inconsistent: For example, the graduate students assigned to the job title of Housekeeping Supervisor grades that ranged from 7 to 20. DX KKK- 2. Also, two of his three students gave grades that differed on average by three grades—a disparity greater than the two-and-one-half grade difference that Dr. Treiman identified between male-dominated and female-dominated jobs in the Cresap job process. See, e.g., Tr. 1561. Again, rather than investigate these disparities among his students, he simply "averaged out" their results. Indeed, ultimately, Dr. Treiman's graduate students rated the male-dominated job title of Custodial Worker I as equal to the female-dominated job title of Clerk-Stenographer I—a result for which Dr. Treiman himself argued there was no "rational basis." Tr. 787-89. For all these reasons—because of Dr. Treiman's problematic methodology and because of his less

than persuasive testimony—the court must disregard entirely the results of this graduate student exercise. It is wholly without probative value, and it does not provide any basis for inferring discriminatory intent in the execution of the Cresap classification and evaluation process.

2. The "Training and Experience" Study

The second item of evidence introduced by the plaintiffs on the question of intentional discrimination in the Cresap process was another study conducted by Dr. Treiman. In this study, Dr. Treiman sought to eliminate the subjectivity inherent in the grading exercise performed by the graduate students. Tr. 596; but see Tr. 688-89. To this end, he analyzed the job specifications prepared during the Cresap process for two "objectively measurable" factors: first, the amount of training and experience required by a particular position; second, whether or not the position entailed supervisory responsibility. Dr. Treiman testified that the first of these two factors constitutes a suitable proxy for the first three factors used by Cresap to evaluate jobs (that is, knowledge and skills, complexity of duties, and independence of action). Tr. 597-98. Thus, in conjunction with a measure for supervisory responsibility, Dr. Treiman believed he had two quantifiable variables that would permit objective evaluation of the Cresap job-evaluation process.

Dr. Treiman then analyzed Nassau County job specifications for these factors. He used data from 1967 as to the number and the sex of Nassau County employees, Tr. 598, and he weighted job titles by the number of employees in each title. PX 1074 at 10. As to training and experience alone, Dr. Treiman found that, "[o]n average ... employees in

female-dominated jobs are 1.7 salary grades lower than employees in male-dominated jobs requiring the same training/experience." PX 1074 at 11; Tr. 598-99. When Dr. Treiman introduced the variable for supervisory responsibility into his study, he found that, on average, as to any given number of years for training and experience, nonfemale-dominated jobs without supervisory responsibility were better compensated than female-dominated jobs with supervisory responsibility. Tr. 606-07; PX 1074 at 14. From these comparisons, Dr. Treiman concluded that Nassau County could not have applied the Cresap job-evaluation procedures in a good faith manner. Tr. 607.

As with his graduate student exercise, however, this court again finds that Dr. Treiman's conclusions are not reliable. First, this "objective" analysis of Nassau County job specifications rests on the critical subjective judgment of Dr. Treiman that the first variable he used—the training and experience variable—was an adequate proxy for the first three Cresap factors. Dr. Treiman testified that he was confident as to the adequacy of the training and experience variable because it is "well known" to be the most important aspect in determining compensation for job titles. Tr. 596. This rationale completely ignores the fact that the two variables used by Dr. Treiman plainly account for only half the job evaluation factors used by Cresap; it also indicates that his study is only half complete. Along these lines, Dr. Treiman further testified that the first three Cresap factors are "very highly correlated" and are "alternative measurements of the same thing." Tr. 597-98; see PX 1074 at 33 n. 9. He ultimately conceded, however, that this determination was entirely subjective. Tr. 695, 696.

Quite apart from the question as to the bases on which Dr. Treiman's confident assertions may rest as a general matter, it is clear that the particular "verification" of this assumption as to the adequacy of the two variables used is untrustworthy. Dr. Treiman's report indicates that the data on which he confirmed the high correlations among the first three Cresap factors and the adequacy of his proxy variable were the data produced by his graduate students in their ratings of Nassau County job specifications. PX 1074 at 33 n. 9 and at Appendix I (entitled "An Unbiased Application of the CMP Job Evaluation Criteria to Nassau County Jobs"); Tr. 695. That is, in order to confirm his critical assumptions about these variables, Dr. Treiman calculated correlations among the point scores assigned by his graduate students. The problems with this procedure are as patent as the flaws in the graduate student exercise are serious: The unreliable results generated by the graduate student evaluations are simply imported into the second study—a study intended in part to confirm the first study. Tr. 612-13. The use of the graduate-student point scores as the underpinning for the training and experience study demonstrates the untrustworthiness of that second project.

Additionally, the fact that Dr. Treiman collapsed the first three Cresap factors into one variable resulted in his ignoring entire sections of the Nassau County job specifications. Tr. 749. And Dr. Treiman also weighted job titles by the number of employees—even though the participants in the Cresap process had not done so. Tr. 742-43. The reasons stated by Dr. Treiman for this methodological move of weighting titles ("ultimately we are interested in what happens to people and not to jobs", PX 1074 at 34 n. 11) is plainly inconsistent as well with the allegations of the plaintiffs' complaint. See

Amended Complaint ¶ 3(D) (alleging discrimination on the basis of sex domination of *jobs*). Dr. Treiman conceded that this aspect of his study could be expected to yield results different from those of the Cresap process. Tr. 743. The court is deeply troubled that Dr. Treiman so readily and so regularly departed from the stated methodology of the Cresap process in order to determine whether or not the Cresap personnel and the Nassau County team had themselves departed from that methodology. The court simply cannot give any weight to this terribly flawed study.

The court is also unable to find that Dr. Treiman's conclusions as to the sex composition of job titles in 1967 are entirely reliable. Dr. Treiman himself had no data as to the sex composition of these job titles; rather, paralegals at the office of the plaintiffs' counsel reviewed the names of many of the incumbents of these job titles during the year 1967, and those paralegals drew inferences as to the sex of each employee from those names. Tr. 685; PX 1074 at 32 n. 6. Indeed, the court notes in this regard that *every* data base used by Dr. Treiman in each of the studies he prepared for the plaintiffs was created by the plaintiffs' attorneys. Tr. 680-85. As to this data base, although the drawing of inferences as to sex from an individual's name is not very significant in itself, these paralegals appear to have proceeded on the assumption that only 6,000 people were employed by Nassau County in 1967, see PX 1075 at Table 1. But, at that time, there were between 8,300 and 10,000 people employed by Nassau County. See PX 621 at II-1 and V-2; compare with Tr. 714 (Dr. Treiman testifying that the number of Nassau County employees in 1967 "was somewhere between five and ten thousand"). There is no indication in the record as to how the subset of 6,000

employees was derived by the plaintiffs—and there is no indication that those 6,000 employees are representative of the 1967 County work force as a whole. Indeed, the plaintiffs have provided precious little information as to how the sex domination of Nassau County jobs in 1967 was determined, Tr. 716-17, and that determination cannot now be adequately reviewed either by the defendants or by this court. Accordingly, to the extent that the conclusions as to the male or the female dominance of Nassau County job titles in 1967 is predicated on inferences made by agents of the plaintiffs from less than all the relevant data—and to the extent this court has been given no basis on which to find that the method for selection of those 6,000 names was a trustworthy one—the court finds that the reliability of Dr. Treiman's assumptions as to sex dominance of job titles in 1967 is somewhat limited. Ultimately, however, the reservations that this court may have as to these data are simply collateral concerns to the deep methodological flaws indicated above. It is on those grounds—coupled with the evasive and unpersuasive testimony of Dr. Treiman—that the court finds the "training and experience" study by Dr. Treiman to be of no weight.

The court must note as well, however, that the problematic aspects of Dr. Treiman's evidence are not found only in his written reports. His testimony before this court was consistently evasive—particularly when he was asked about latent (or patent) flaws in his studies. Thus, it often required extensive questioning either by counsel or by the court to secure from Dr. Treiman a candid response about whether a particular methodological error on his part affected the results of his study. For example, after Dr. Treiman acknowledged that he had erroneously coded a job requirement of

"elementary education" as six years rather than as eight years because he was drawing on his experience as "a boy in California" rather than on the actual school system in Nassau County, Tr. 700-09, Dr. Treiman was initially unwilling to admit that his mistake had skewed other aspects of his training and experience study:

> THE COURT: Just let me see if I understand this for a minute. If your assumption is wrong with respect to elementary school being six when it should be eight, then the ten would be wrong, too, wouldn't it, or would it? How did you get to ten? You built in two more years of junior high and added on top of that two more years.
>
> THE WITNESS: I am sorry, ten on page—
>
> THE COURT: I am looking at footnote 33. You made no provision for what your experience was in California of junior high. Is that it?
>
> THE WITNESS: Sir, that was what I was working from was the job specifications and the job specifications in Nassau County refer to elementary education. They refer to some high school. They refer to high school graduation. I made an error. It's now, obviously an error in coding elementary education as six instead of eight; but it would have no impact on the rest of the codes.
>
> THE COURT: Okay. Well, if a person had eight years of elementary school education and two years of experience, where would you code that?

THE WITNESS: It's coded by the job. The job says elementary education and if it says elementary education plus two years of experience, I would have coded it as an eight on page ten.

THE COURT: Suppose that a person had an elementary school education and four years of experience, where would you code that?

THE WITNESS: That would be coded as ten.

THE COURT: It should be 12, right, assuming that an elementary school education should be an eight. So, it might [a]ffect some other numbers. Is that right?

THE WITNESS: Yes, that's correct.

Tr. 709-10. A colloquy such as this reveals either that Dr. Treiman is unable to appreciate and to assess the effects of the methodological defects in his study or that he is unwilling to testify candidly about those effects. Neither possibility secures the confidence of this court in his evidence.

For their part, the defendants attempted to demonstrate through one of their expert witnesses, Dr. David P. Jones, that Dr. Treiman's study would not have indicated a sex-related disparity in 1967 salary grades had he accounted for additional factors in the Cresap process. DX GGG-1 (report of Drs. Jones and Haworth to defendants, dated November of 1989 and entitled: "Summary of Statistical Employment and Compensation Patterns by Gender in the Nassau County Government: 1980 and 1986"). Specifically, Dr. Jones undertook to demonstrate that the salary grades assigned by

Cresap were affected by the local labor market and by the number of hours worked each week for particular job titles; Dr. Jones concluded that, once these two factors are taken into consideration, the sex-related disparity in job grades is statistically insignificant.

Dr. Jones repeated Dr. Treiman's "training and experience" study with several modifications. First, in order to obtain statistically significant examples, Dr. Treiman restricted his own study to those Nassau County job titles that had 15 or more incumbents. Tr. 1583-84. That is, Dr. Jones wanted to eliminate the possibility that the sex of only two or three employees would radically alter the sex-dominance of a particular title. This restriction left Dr. Jones with 101 Nassau County job titles for his study. Tr. 1583-84. Next, Dr. Jones rated these 101 titles not only on the two factors used by Dr. Treiman but also on three factors derived from the Dictionary of Occupational Titles. Tr. 1581-82. Notably, Dr. Treiman was the staff director of the committee that developed the Dictionary of Occupational Titles. Tr. 581. These factors were used to provide Dr. Jones with a job description analysis that he expected to parallel that of Dr. Treiman. Tr. 1632-33. Dr. Jones then collected current labor market data for as many of these 101 titles as he could. Dr. Jones and his staff attempted to match Nassau County job specifications with jobs in the New York counties of Rockland, Suffolk, and Westchester as well as with jobs in New York City. Tr. 1593-96; DX GGG-4 and DX GGG-5. These procedures left Dr. Jones with 80 usable job titles. Tr. 1622-23. However, Dr. Jones used the same data as to the sex composition of Nassau County jobs in the year 1967 that Dr. Treiman had used. Tr. 1537.

Dr. Jones then conducted regression analyses without a variable for labor market data. Tr. 1625. He found that, on the bases of the variables from Dr. Treiman's "training and experience" study, there was a significant correlation between salary and sex in Nassau County jobs. Tr. 1626; DX GGG-1 at 45. Similarly, Dr. Jones found similar results when he considered the job characteristic variables derived from the Dictionary of Occupational Titles. Tr. 1632-33; DX GGG-1 at 47. Thus, whether he used the variables derived by Dr. Treiman or the variables from the Dictionary of Occupational Titles, Dr. Jones was able to confirm the conclusion of Dr. Treiman that the sex composition of Nassau County jobs does have a high correlation to the salary grade midpoints of those positions. Tr. 1633-34. However, Dr. Jones found that when he introduced into these regression analyses an independent variable to represent the market data he had gathered, the sex composition of jobs was of virtually no statistical significance as to the original salary grade disparity. Tr. 1635-36, 1641-42; DX GGG-1 at 54; DX GGG-1 at 57. Dr. Jones achieved similar results upon the introduction of a variable to represent the number of hours worked by employees of different Nassau County job titles: Again, Dr. Jones found that a variable for the length of the work week reduced the effect of sex on salary (although not as much as did the variable for labor market data). Tr. 1647-49; DX GGG-1. Thus, Dr. Jones concluded and testified that Dr. Treiman's "training and experience" study had omitted important variables and that, once those variables are considered, Dr. Treiman's study would not suggest any relationship between sex composition and the setting of salary grades during the Cresap process. Tr. 1655; see also DX GGG-1 at 60.

Although the court found Dr. Jones' study to be procedurally sound (with certain possible exceptions such as the use of the 1967 sex-composition data), the weight that the court is able to attribute to the conclusions of Dr. Jones is significantly limited by the paucity of corroborating evidence that the County of Nassau ever considered either the labor market or the length of the work week when it determined the initial Cresap grades. First, as to length of the work week, the County adduced absolutely no evidence that the participants in the Cresap process ever considered this factor—or even had data as to it—when they established salary grades. See, e.g., Tr. 326. Next, as to the labor market data, although the Cresap team did collect market salary information on 63 "benchmark" jobs, the final Cresap report does not indicate that the market data were used to set or to modify the salary grades of particular job titles. Rather, the report indicates that the market data were used to draft broad salary "trend lines" for comparisons as to the ranges of salaries offered by Nassau County and by other communities. PX 621 at IV-4 to IV-6; Tr. 1605-06. Further, no participant in the Cresap process testified that market data were used to adjust salary grades. See, e.g., Tr. 327-29 and 1609-12. On the other hand, concern with the competitiveness of Nassau County salaries recurs in almost every segment of every report from Cresap to the County. It would not be an implausible inference that the consultants whose task it was to design a competitive salary plan might have amended salary grades for certain job titles in order to ensure such competitiveness. However, there was no evidence introduced to support this conclusion beyond the findings of the regression analyses of the defendants' expert. Accordingly, the court is unable to conclude that the Cresap

team actually considered market data in setting individual salary grades.

Because there is no satisfactory support for a finding that the variables introduced by Dr. Jones actually affected the assignment of salary grades to particular job titles during the Cresap process, Dr. Jones' conclusions are only marginally relevant to the question of discriminatory intent. Nonetheless, the court will note that it specifically rejects two challenges posed by the plaintiffs to Dr. Jones' methodology. First, the plaintiffs attacked the procedures followed by Dr. Jones and by his staff to collect labor market data, see, e.g., Tr. 1718-39; however, the court found these procedures to be both reasonable and reliable. Accordingly, the court credits the results of Dr. Jones' labor market survey to the extent those results are relevant to issues in this action. Second, the plaintiffs attacked Dr. Jones' restricted sample of 101 Nassau County job titles as unrepresentative of Nassau County job titles generally. Tr. 1748. However, the court found that the decisions made by Dr. Jones as to the bases on which job titles would be eliminated from his study were sound. The court also notes that Dr. Jones was able to obtain with that sample—and with other data used by Dr. Treiman—results that were similar to the results obtained by Dr. Treiman in his "training and experience" exercise. Tr. 1633-34. The plaintiffs thus stand in an awkward posture when they attack Dr. Jones' procedures.

Again, without even considering the refinements suggested by Dr. Jones' report, this court does not find that the "training and experience" analysis of Dr. Treiman provides evidence of discriminatory intent in the Cresap process. Rather, the questionable—and poorly verified—assumptions on which

that study is based as well as the flawed methods with which it was executed erode completely what little confidence this court might have had in Dr. Treiman's conclusions after observing his testimony. This court credits neither Dr. Treiman's testimony nor the results of his "training and experience" analysis.

3. Plaintiffs' Exhibit 616/616-A

The next item of evidence introduced by the plaintiffs to demonstrate discrimination in the execution of the Cresap process was plaintiffs' Exhibit 616-A. This exhibit is a color photocopy of a thirty-three page document retrieved from the files of the Nassau County Civil Service Commission. See PX 1082 (stipulation of counsel that Exhibit 616-A was found in a Nassau County file folder marked: "CMP—Point Evaluation to Determine Grades"); but see PX 1096 at 48-49 (exhibit retrieved from "junk" files). Exhibit 616-A contains job titles typewritten on the left side of each page; these job titles are grouped under general headings, and they are alphabetically arranged within each grouping. Next to these job titles are five columns that are headed (at least on page one of the exhibit): "K-S", "C-V", "IA", "S", and "T". Numerical values that correspond to job titles are handwritten in the columns under these headings. However, many of these numerical values have been crossed out by hand in different colors of ink; some columns show several numbers crossed out, rewritten, and recrossed out. Most of the crossed out values fall within the "T" column. Further, there are other job titles handwritten onto the document in red ink; many of these job titles do not have numerical values associated with them. Some of the typewritten job titles are crossed out, some are changed, and

some have handwritten "check" marks next to them. Stray handwritten marks found on the document include question marks, dates, apparent deletions of entire sections, the letter "x", words such as "ok", "wrong", and "out", and illegible scribbling. Two of the pages have sections of yellow legal paper pasted or taped onto them; handwritten on those pieces of legal paper are job titles for which there are handwritten columns but no numerical values.

Vito Competiello—a former employee of the Nassau County Civil Service Commission who participated in the Cresap job evaluation process, Tr. 288—testified that Exhibit 616 (a monochromatic photocopy of Exhibit 616-A, Tr. 838) is a draft for a master compilation of Nassau County job titles and of the job evaluation point scores for those titles. Tr. 334, 376. Accordingly, the notations at the tops of the columns on Exhibit 616-A denote the four Cresap evaluation factors: knowledge and skills ("K-S"), complexity and variety of duties ("C-V"), responsibility for independent action ("IA"), and supervisory responsibility ("S"). The "T" column is intended to represent the total of these point values for each job title. Competiello testified that he recognized some of the handwriting on Exhibit 616 as his own, but he could not identify many of the notations. He did not unequivocally indicate that he could identify when the information on Exhibit 616 was compiled or what use, if any, was made of it.

The plaintiffs have assumed that Exhibit 616-A contains the final results of the Nassau County job evaluation process—that is, that it lists "the point scores assigned to Nassau County jobs in 1966 by the team that applied the four-factor job evaluation methodology" of the Cresap

process. Tr. 613; see also PX 1075 at 1 (supplemental report of Dr. Treiman to plaintiffs, dated November 1989 and entitled: "Job Evaluation Points and Ordinanced Salary Grades: Discriminatory Changes in Salary Grade Assignments, Nassau County 1966-67"). On this assumption, Dr. Treiman, on behalf of the plaintiffs, calculated the salary grades "that would have resulted from the[ ] point scores" on Exhibit 616, PX 1075 at 1; he then compared these grades to the grades that were proposed by Cresap in its final report to the County and to the grades that were eventually enacted by the County in 1967. The purpose of this exercise was "to ascertain whether changes in salary grades subsequent to the evaluation reported in Exhibit 616 were related to the gender composition of jobs." PX 1075 at 1.

Again, Dr. Treiman found evidence of discrimination. He recanted the finding of his earlier report to the effect that "[b]ased on Exhibit 616, it now appears that the job evaluation procedure itself may have been carried out in good faith ... but that subsequent to the evaluation procedure the salary grades of a large number of Nassau County jobs were altered in a discriminatory manner." PX 1975 at 2. That is:

> Specifically, in the final report to Nassau County submitted to Nassau County by Cresap [Exhibit 621] the salary grade of the average employee in male-dominated jobs was increased by nearly two grades (1.9) while the salary grade of the average employee in female-dominated jobs was not increased at all.... Subsequent to the Cresap report, there was a minor reduction in this gender differential, so that the ordinanced salary grade for the average employee in a male-dominated

> job was 1.6 grades higher than the salary grade derived from the point scores in Exhibit 616, while the ordinanced salary grade for the average employee in a female-dominated job was one-tenth of a salary grade higher than the salary grade derived from Exhibit 616.

PX 1074 at 2.; Tr. 619-20. Thus, for example, after he converted the point scores on Exhibit 616 into salary grades, Dr. Treiman found that the mean salary grade for jobs that were 81% to 90% male in 1967 would have been 8.1 as scored on Exhibit 616. But as recommended in the final Cresap report, the mean salary grade for those jobs was 9.5. On the whole, he found that the difference in mean salary grades for male-dominated jobs between the Cresap final report and Exhibit 616 was 1.9; the difference in mean salary grades between the Cresap final report and Exhibit 616 for female-dominated jobs was 0.0. PX 1075 at Table 1.

Dr. Treiman concluded that the existing differential in salary grades between male-dominated jobs and female-dominated jobs "is mainly attributable to changes in the salary grade of male dominated jobs between the [Exhibit] 616 point scores and the Cresap final report." Tr. 620. Finally, Dr. Treiman determined that these changes in mean salary grades strongly supported an inference of sex discrimination:

> Although I do not know who is responsible for these alterations, their intent and effect are completely clear—to increase the salary grades of the largest male-dominated jobs relative to what these jobs should have been paid on the basis of an application of Nassau County's *own criteria for determining compensation.*

PX 1075 at 2-3 (emphasis in original).

However, the court is unable to agree with the plaintiffs as to the nature of Exhibit 616-A. Most importantly, the court cannot find that Exhibit 616-A constitutes a master compilation of the final scores from the Cresap job evaluation process. Rather, Exhibit 616-A is clearly a working draft that was not a list of the ultimate scores from the job evaluation process but rather part of the job evaluation process itself. The lists in Exhibit 616-A are incomplete. For example, there are typewritten job titles with point values on Exhibit 616-A that do not appear at all in the final Cresap report. Compare, e.g., PX 616-A at 18 ("Hospital Administration Trainee") with PX 621. Conversely, there are approximately one hundred job titles handwritten onto Exhibit 616-A that have no point values assigned at all. The plaintiffs argue that these were jobs added to the Nassau County system after the classification process, and Competiello initially confirmed this view. Tr. 361. However, a comparison between these titles and the addendum to the final Cresap report that lists the titles created through the appellate process demonstrates that the plaintiffs' argument is groundless—and that Competiello's recollection was inaccurate. Tr. 375.

Moreover, perhaps one-quarter to one-third of all the numerical values in the "T" column are crossed out; a small number of those have new values written in either above or next to the old values. Almost invariably, where new numbers are recorded in the "T" column, at least one of the values in the other four columns has been changed. This fact strongly suggests that Exhibit 616-A records many of the moments of review and revision in the job evaluation process. Similarly,

numerous notations are scattered throughout Exhibit 616- A; entire groups of job titles are crossed out or are inserted; question marks, "stars", and "check" marks all indicate that Exhibit 616-A represents anything but the end of the job evaluation process.

The plaintiffs have attempted to make much of the fact that Competiello identified as his handwriting a notation on page 15 of Exhibit 616 that reads "6/8/66." Tr. 336. The plaintiffs argue that this notation—dated in the same month that Cresap issued its final report to Nassau County—demonstrates that Exhibit 616-A was a master list that recorded all the point scores for the Nassau County titles from which Nassau County selectively departed in the assignment of salary grades. But that conclusion is not supported by the exhibit when considered as a whole: As indicated, there are over one hundred job titles listed on Exhibit 616-A for which no point scores at all have been recorded. Thus, if the fact that Competiello wrote on the document a date contemporaneous to the issuance of the final Cresap report demonstrates anything of significance, it shows that Exhibit 616-A could not have been a catalogue of the "final results" of the job evaluation process. Similarly, other dates recorded on Exhibit 616-A are inconsistent with the plaintiffs' understanding of that document. For example, another notation on page 15 of the exhibit records a date in September of 1965. Tr. 336. But Competiello testified that the job evaluation process did not even begin until early 1966. Tr. 308, 317. Such inconsistencies between Exhibit 616-A and the testimony of Competiello about the Cresap process further obscure the meaning and the significance of that document.

Moreover, the court notes that Competiello could not recall clearly the nature and the purpose of Exhibit 616—a document that he had not reviewed in the 24 years between the Cresap process and this litigation. Competiello was unable to identify the document with confidence as anything more than a draft, and he did not satisfy the court that the numerical values recorded on Exhibit 616 were the "final results" of the job evaluation process. Tr. 333-34, 343; compare Tr. 356 with Tr. 376. Curiously in this regard, the plaintiffs never asked Competiello to identify Exhibit 616-A—the color copy of the original document which clearly revealed different markings in different colors of ink. Rather, they asked him only to identify Exhibit 616, a monochromatic photocopy of that document. The reluctance of the plaintiffs to provide Competiello with an exhibit which more closely approximates the original document about which he was to testify is troubling to this court, and it underscores the degree to which Competiello was easily led by the questions asked of him as to the nature and the content of Exhibit 616. Compare Tr. 356 with Tr. 376. Quite frankly, the court found that Competiello improvised many of his "recollections" about Exhibit 616. Compare with Tr. at 305 (Competiello inaccurately recalling number of desk audits conducted during Cresap process). For this reason, the court does not credit Competiello's testimony as to the nature of Exhibit 616.

More credibly, Competiello testified that the job evaluation process—through which points were assigned to job titles—was a protracted undertaking. Tr. 333. He also testified that many of the early "results" were revised on the basis of information gathered during the desk audit phase of the classification process; for example, a member of the Cresap

team who thought that a particular job had been inadequately scored might suggest aspects of the job that would merit a change in that score. Tr. 333. The markings of Exhibit 616-A confirm this testimony. In any event, Competiello testified that, after initial scores were assigned to jobs by individual members of the team, all four members reviewed and discussed the preliminary scores in order to make informed and consistent modifications. Tr. 333. Exhibit 616-A plainly captures one—or perhaps many—of the moments in that process; but the court has no satisfactory basis on which to conclude that 616-A is the last moment—or even a significant moment of that process. Indeed, the fact that Exhibit 616-A was found in the files of Nassau County strongly suggests that it was not ever transmitted to Cresap for incorporation into the final report. Interestingly, the plaintiffs did not present the exhibit to those witnesses who had worked for the Cresap firm during the job evaluation process. The court simply cannot conclude that Exhibit 616-A is in any manner a reliable indication of what the final job evaluation scores were. In other words, the probative value of this exhibit is limited to confirming that the Nassau County team did in fact score job titles, did in fact total those point scores, and did in fact make numerous revisions to the points throughout the evaluation process. But those facts were never in dispute in this action.

Even if this court could have agreed with the plaintiffs that Exhibit 616-A lists the final results of the job evaluation process, the court would nonetheless be compelled once again to disregard the conclusions drawn from that document by Dr. Treiman. As indicated above, Dr. Treiman undertook an analysis of the salary grades that would have been generated by the point scores on Exhibit 616-A (again, on the assumption

that the exhibit lists the final results of the job evaluation process), and he compared those salary grades to the salary grades ultimately proposed by Cresap in its final report to the County. He found that the average salary grade for male-dominated jobs in the final Cresap report was 1.9 grades higher than the average salary grade for male-dominated jobs that would have been the result of the point score totals on Exhibit 616-A. Dr. Treiman also found that the average salary grade for female-dominated jobs in the final Cresap report was the same as the average salary grade for female-dominated jobs that would have been compelled by the point score totals on Exhibit 616-A.

But Dr. Treiman's study is unreliable. First (and of less importance), the basis upon which Dr. Treiman determined whether a particular job title was male-dominated or female-dominated in 1967—the time of the Cresap process and, hence, the time relevant to studying "selective departures" in that process—is weak. As indicated above with respect to his "training and experience" study, Dr. Treiman's data as to the sex composition of Nassau County jobs in 1967 are somewhat suspect, and the plaintiffs have provided no basis on which to evaluate the trustworthiness of the process by which those data were derived. Again, however, the problems with these data are most telling insofar as they simply reveal the casual procedures that characterize Dr. Treiman's work as a whole. Similarly, the data base used by Dr. Treiman as to the point scores on Exhibit 616 was prepared for him entirely by the plaintiffs' attorneys. However, he testified that he himself is unable to verify the reliability of those data:

Q: Well, did you ever make any inquiry to find out how this information had been assembled for you?

A: I am sure that we discussed it. I do not recall the discussion.

Q: Wouldn't you agree with me, Doctor Treiman, that the accuracy of the data that you're analyzing is something that's very important to an expert like yourself?

A: Yes.

Q: And, in fact, if the data isn't right, the analysis surely isn't right. Isn't that correct?

A: Yes.

Q: It's the old story of bad in and bad out, right?

A: Yes.

Tr. 716-17. That Dr. Treiman would adopt as his own data which he is unable now to validate illustrates the cavalier—or, worse, partisan—character of his endeavors in this action. The court is unable to credit completely the reliability of quantitative evaluations made by the plaintiffs' attorneys' paralegals and accepted at their face value by an expert—particularly to the extent that the expert acknowledges that his conclusions are only as reliable as his data.

Further, the assumptions made by Dr. Treiman—or, more accurately, by the plaintiffs' attorneys who compiled the data used by Dr. Treiman in all his studies—as to the point totals on Exhibit 616 are dubious at best and inexcusably deficient

at worst. Dr. Treiman grounded his analysis on the point totals as they are found on Exhibit 616; but he admitted that, wherever Exhibit 616 contains a job point total that is crossed out but that does not have a new value written in, Dr. Treiman used the crossed out value as the point total. Thus, for example, Dr. Treiman determined that the salary grade for the title of Cashier II would have been a grade of six on the basis of Exhibit 616; but a review of either Exhibit 616 or of Exhibit 616-A reveals that the only point total written in for Cashier II has been crossed out. Dr. Treiman nonetheless assumed that this crossed-out value represented the "final result" of the job evaluation process for the title of Cashier II. Compare PX 616-A at 3 with PX 621 at III-4 and with PX 1075 at Table 2. He made similar assumptions as to at least one hundred more job titles for which numbers in the "T" column had been crossed out.

As though this aspect of his methodology were not sufficiently questionable, Dr. Treiman did not even apply it consistently. In those instances for which a value had been crossed out in the "T" column and for which a new value had been recorded by hand, Dr. Treiman used the second value—not the first—as the basis for his analysis. PX 1075 at 2 n. 1; Tr. 799. Thus, rather than proceed uniformly on the assumption that the initial values were the "final results" of the Cresap job evaluation process, Dr. Treiman determined that a later recorded value was the "final result" of the job evaluation process. This inconsistency obviously takes no account of the very compelling inference that, as with the job titles for which new point totals had been recorded, new values were contemplated and intended for the job titles as to which the initial point totals had been crossed out. Thus, for Dr.

Treiman, a point total was "final" if it had been simply crossed out; if a point total had been crossed out and revised, the newer total was the "final result." The court simply cannot agree that any aspect of Exhibit 616-A warrants Dr. Treiman's casual methodological distinctions. Indeed, Dr. Treiman did not even undertake to determine whether these revisions on the face of Exhibit 616 would support an inference of discriminatory modifications—even though he conceded that, given the purpose of his study, it would have been a "reasonable thing to do." Tr. 847-48.

To the extent that Dr. Treiman's analysis relies on hundreds of numerical values of uncertain significance or finality—and to the extent that Dr. Treiman treated these values inconsistently—the court cannot accept his findings as reliable analyses of Exhibit 616-A. Pages and pages of numerical values on Exhibit 616-A have been stricken, and yet Dr. Treiman—with no apparent justification—treated those values as "final results." Moreover, as noted above, many of the job titles on Exhibit 616-A have no point totals indicated at all; Dr. Treiman, of course, had to omit those titles from his study. For all these reasons—and, again, because his testimony on these points was simply unpersuasive—the court finds Dr. Treiman's analysis of this document to be of no probative value: It provides no basis for a finding of discriminatory intent in the execution of the Cresap process.

One of the experts who testified on behalf of the defendants, Dr. Jones, indicated that his own analysis of Exhibit 616-A was inconsistent with any inference of discriminatory intent in the Cresap evaluation process. Dr. Jones first examined the changes that appear on the face of Exhibit 616-A to determine

whether or not they bore any statistical relationship to the sex composition of Nassau County jobs; he found that they did not. Tr. 1541-44.

Next, Dr. Jones undertook to determine whether or not the results found by Dr. Treiman—that the differences in mean salary grades between Exhibit 616-A and the final Cresap report suggested discrimination against women—would still hold after the introduction of variables other than the sex composition of jobs. More specifically, Dr. Jones evaluated Dr. Treiman's results with the introduction of one variable to represent the market salary data collected by Cresap and of a second variable to represent the pre-Cresap salaries of Nassau County jobs. Tr. 1547-48. Dr. Jones found that, after a regression analysis with these variables, the market-data variable and the existing-salary variable helped to explain the salary grade differential between Exhibit 616-A and the final Cresap report. Tr. 1550. He also found that the sex composition of these job titles was no longer statistically significant after the introduction of these new variables. Tr. 1550. In other words, Dr. Jones reported that, on a statistical analysis, the differences in mean salary grade that Dr. Treiman identified are better explained by the market information collected by Cresap and by the pre-Cresap salaries of Nassau County jobs than by the sex composition of those titles.

A similar regression analysis conducted by a second expert for the defendants, Dr. Joan G. Haworth, an economist, achieved results consistent with the findings of Dr. Jones. Tr. 2020-25; see also DX KKK-8. Dr. Haworth found that the factors of the 1967 salary market and of the pre-Cresap pay rates exhibit a stronger statistical relationship to the "changes"

between Exhibit 616-A and the final Cresap report than does the factor of sex composition. Tr. 2023; DX KKK-8. She testified that the "gender coefficient" identified by Dr. Treiman in his analysis of Exhibit 616 and of the Cresap final report becomes statistically insignificant when market and pre-Cresap salaries are introduced. Tr. 2023. Thus, from these reports, the defendants would have the court infer that these salary grade differentials are not the product of sex discrimination but of an attempt to adjust salary grades so as to track market salaries and so as not to depart from pre-Cresap salaries.

For the most part, the court finds Dr. Jones' and Dr. Haworth's modifications to Dr. Treiman's study to be reliable (although the court has some reservations about the methods by which Dr. Jones narrowed the relevant data base, see Tr. 1673-80); that is, the court generally accepts the results of the regression analyses of Drs. Jones and Haworth. Nonetheless, the court finds their conclusions in this regard to have little weight. First, as indicated above, the court has determined that Exhibit 616-A cannot be read as a reliable source of data concerning the job evaluation survey. To the extent that Dr. Treiman's data as to point score values are not trustworthy, the analyses of Drs. Jones and Haworth (which parallel Dr. Treiman's study) are equally dubious representations of what happened during the Cresap process. Even though Drs. Jones and Haworth made changes to Dr. Treiman's data base for their studies, Tr. 838, 842, and 1538-39, their data bases were nonetheless derived from the same unreliable source as was Dr. Treiman's—that is, from Exhibit 616-A.

Further, the court finds that there is at best only an incomplete basis in the record to support a conclusion that market data and pre-Cresap salaries were actually considered in the setting of salary grades during the Cresap process. Although the final Cresap report indicates that jobs were evaluated and grades were assigned on the bases of the four factors indicated above, the report does not state that no other factors were considered. Nonetheless, the evidence that these two particular factors—labor market data and pre-Cresap grades—were also used in the determination of specific salary grades is not compelling.

First, as indicated above with respect to the training and experience study of Dr. Treiman, the court finds no satisfactory basis on which to conclude that the Cresap process entailed the use of labor market data to set specific salary grades. Next, as to consideration of pre-Cresap salaries, the evidence is even less supportive of the defendants' argument. Not only was there absolutely no testimony that the County team or the Cresap personnel modified salary grades in order to maintain pre-Cresap salaries, the final Cresap report strongly implies that such was not the case. The cover letter for the Cresap report indicates that, in those cases for which the proposed salary grade would generate a salary lower than the present salary of a job title, "[n]one of these individuals should have his salary reduced so long as he holds the position, but such employees should not continue to receive salary increases in the future unless they are moved to higher level positions." PX 621 (cover letter). This proposed process for handling disparities between existing salaries and proposed salaries—known as "redlining" of job salaries, Tr. 852—is simply inconsistent with the argument of the defendants that

salary grades were altered so as not to effect significant changes in the Nassau County salary status quo.

For all these reasons, the court is unable to attribute more than minimal weight to the modifications to Dr. Treiman's report that were conducted by Drs. Jones and Haworth. Indeed, the court finds it more than a little remarkable that so much expert time and so much expert money were devoted to an exegesis of Exhibit 616-A—a document of obscure content and of dubious significance. As indicated above, Exhibit 616-A is not at all probative of the "final results" of the job evaluation process; as such, the studies and analyses of Exhibit 616-A are not probative of discriminatory intent in that process.

4. Conclusion as to Cresap Process

Finally, the court finds that—beyond the studies of Dr. Treiman and beyond Exhibit 616-A—the plaintiffs introduced no other evidence that was probative of discriminatory intent in the Cresap process. Indeed, as indicated above, testimony adduced by the defendants indicated that no one associated with that process had any information as to the sex composition of Nassau County jobs in 1967. See, e.g., Tr. 377, 1455, and 1610. This fact—along with the difficulty encountered by the plaintiffs in collecting such data—confirms that the participants in the Cresap process had no particular knowledge as to the sex composition of individual Nassau County job titles at the time of the salary grading process. Again, every witness associated with that process denied that any decision or determination was ever made on the basis of the sex of job incumbents or on the basis of the sex domination of any particular title. See, e.g., Tr. 348,

377, 435, 1455, and 1464. The court found those denials credible and consistent with the evidence adduced by the plaintiffs as to the Cresap process. Accordingly, the court finds that there was no discriminatory intent in the Cresap job classification and evaluation process.

B. Discrimination after the Cresap Process

1. Perpetuation of the Cresap System

The plaintiffs argue that the discriminatory aspects of the Cresap system have been perpetuated by the County. Specifically, the plaintiffs point out that the Cresap system remained in place through the time of this trial and that new job titles in Nassau County are assimilated to old job titles. See, e.g., Tr. 389-96 and 1282-84; PX 1074 at 17-19 (report of Dr. Treiman); see also PX 1096 at 10-13. However, the fact that Nassau County continues to use the Cresap structure as the basis for its classification and compensation system is only probative of discriminatory intent to the extent that the initial execution of the Cresap process involved discriminatory intent or to the extent that it is perpetuated because that system has adverse effects on women in female-dominated jobs. The court has already determined, however, that there is no evidence of discriminatory intent in the Cresap process. Further, the plaintiffs introduced absolutely no evidence that the County continues to use the Cresap system because it treats these plaintiffs less favorably than it does other employees. Accordingly, the mere fact of the perpetuation of that system—either through preserving existing titles and salary grades or through assimilating new titles to old ones—does not indicate that the County of Nassau has in the past or does

now discriminate against its female employees in compensation.

2. Requests for Upgrades since Cresap

The plaintiffs sought also to show that the manner in which the County has considered requests for upgradings of particular titles since the Cresap process is probative of discriminatory intent by the County. That is, the plaintiffs attempted to show that the County has generally denied requested upgrades for female-dominated job titles but that the County has expeditiously granted upgrades for male-dominated titles. See, e.g., PX 1074 at 19-28 (report of Dr. Treiman). However, the court finds that the evidence on this issue is not as simple as the plaintiffs have presented it; rather, the evidence reveals that the County has undertaken a variety of legitimate responses for non-discriminatory reasons to the problems that drive requests for upgrades. That is, the court finds that the evidence on this point does not support an inference of discriminatory intent.

As a threshold observation, this court was disturbed by the report and the testimony of Dr. Treiman on this question of the County response to upgrade requests. See PX 1074 at 19-28; Tr. 634-36. With the exception of a brief "quantitative analysis" in his report, Dr. Treiman's conclusions are based on a review of County memoranda and of deposition testimony; his report details little more than his inferences and "impressions" from those sources. See, e.g., PX 1074 at 23. A study of the evidence evaluated by Dr. Treiman readily reveals that it presents factual issues properly resolved by this court—not by an expert witness. Indeed, it is plain that Dr. Treiman's expert qualifications as a sociologist and as a

statistician were entirely irrelevant to this segment of his report.

As indicated above, employees and departments often request upgrades for particular job titles. These requests are reviewed by the Nassau County Civil Service Commission; although the Civil Service Commission either recommends or disapproves of the requested upgrade, final authority to change the salary grade of a job title rests with the Board of Supervisors. Further, the two principal criteria on which the Civil Service Commission considers requests for upgrades are changes in the complexity of job duties over time and problems with recruitment or with retention of personnel.

Almost all the job titles in the caseworker career line—the incumbents of which handle adoptions, foster care, and protective services—are female-dominated. Tr. 450-51; PX 672. Despite the fact that the Department of Social Services has perceived increasing complexity of job duties in these titles, PX 1086 at 23-28—and despite the fact that there have been clear recruitment and retention problems for the lower caseworker job titles, Tr. 451 and 947—the County has denied requests for upgrades of these titles even when recommended by the Civil Service Commission. Tr. 456-57 and 924-25. However, two important facts undermine any inference of discriminatory intent: First, retention problems in the caseworker title series have arisen largely from the fact that the male and female incumbents of those jobs move almost invariably and always freely into the more highly paid job titles of the probation officer job series. PX 126; Tr. 452, 481, 925-26, 1277, and 1412-13. That the County has never sought to prevent the female caseworkers from effectively

"upgrading" themselves into more well compensated positions with the County belies the notion that the County has intentionally underpaid them because they are women. Second, in lieu of specific upgrades, the County has encouraged mass promotions of caseworkers into higher titles within that job series—thereby increasing their salaries. PX 1086 at 31.

Similarly, the Department of Social Services has frequently sought upgrades for the job titles in the female-dominated social welfare examiner job line. Tr. 449-450 and 496. The Department has demonstrated to the Civil Service Commission that it has had severe retention problems in the Social Welfare Examiner I title and that the salary for that title was below market rates. Tr. 445-50. All requests for upgrades have been denied by County officials—even when recommended by the Civil Service Commission. Tr. 450 and 924. However, to alleviate the retention problems, the Civil Service Commission permitted the Department to institute rapid mass promotions of employees in the title of Social Welfare Examiner I to the title of Social Welfare Examiner II. Tr. 474-76, 479 and 1271. The result of this policy is that employees in the entry level position of Social Welfare Examiner I are now promoted after only six months to Social Welfare Examiner II—and that they receive a three-grade increase upon promotion. Tr. 477. Thus, in effect, the lowest level employees of the social welfare examiner job series have received a three-grade upgrade. Tr. 475-77. This has reduced the retention problems in that job series. Tr. 477. To the extent that this job series is female-dominated, the policy of early and regular promotions—with its attendant increase in salary—is plainly inconsistent with discriminatory intent.

The dietitian job series is female-dominated. PX 672. The plaintiffs argue that two aspects of the salary grades for these jobs reveal discriminatory intent. First, although one of the "rules of thumb" of the personnel specialists at the Civil Service Commission is that job titles that require a baccalaureate degree are given a salary grade of ten, the title of Dietitian I (which does require such a degree) was given a salary grade of nine through the Cresap process, and that grade has remained unchanged. PX 672. Second, repeated requests for upgrades because of recruitment and retention problems have been denied. Tr. 457-58, 934; PX 262; but see DX ZZZ-3 at 10. However, as to the first of these, the court notes that "training and experience was only one of four factors on which a job was evaluated and on which a salary grade was assigned during the Cresap process. Thus, that Dietitian I was given a salary grade of nine and other job titles that required a college degree were given a grade of ten is not in itself particularly probative of discriminatory intent. Cf. Tr. 392. Next, although the County has denied upgrade requests for the dietitian series, it has undertaken to hire new employees for these jobs at higher salary steps. Tr. 482. In other words, the County now pays those employees—who are, by hypothesis, mostly women—more than it did before. Tr. 482-83. Discriminatory intent cannot be inferred from the fact that the County has refused to grant an increase in salary grade while effectively granting an increase in the salary itself.

The plaintiffs make similar arguments as to the job titles in the career series of physical therapists and of occupational therapists. The court notes first that not all the job titles in these career lines are female-dominated. For example, Physical Therapist I has six male incumbents, five female incumbents,

and one incumbent whose sex is not reported in the record. See PX 672. In any event, the County has refused to grant upgrades to these titles despite severe recruitment and retention problems. Tr. 518-19. Again, however, the County has begun to hire employees for these titles at higher salary steps—thereby providing higher compensation for these jobs. Tr. 518- 19.

The registered nurse job titles are female-dominated. PX 672. Since at least the early 1980s, recruitment and retention problems in these job titles have been severe and persistent. Tr. 525-26. Nonetheless, the County has increased compensation for these employees more than once. In 1982, the County began to higher nurses at above entry-level salary steps. Tr. 917-18; in 1987, the County granted (through the collective bargaining process) a one-grade "vertical" upgrade—pursuant to which nurses were moved to the next higher salary grade at the same step they had previously occupied. Tr. 1362-64 and 1372. In that the County has increased the pay of these job titles, the court is unable to find that the response of the County to recruitment and retention problems with registered nurses reveals any discriminatory intent toward women.

In contrast to all these job titles for which upgrades have been denied but for which special pay increases have nonetheless been granted, the female-dominated job series of police communications operator appears to have suffered from chronic and severe recruitment and retention problems for the better part of a decade. PX 912-M. Nevertheless, requests for upgrades have been denied. Tr. 1122-26. The County has adduced no evidence that these job titles received increases in

compensation to address these recruitment and retention problems. This failure by the County to upgrade these titles or otherwise to provide additional pay to the job incumbents is inconsistent with the County policy of providing salary increases under such circumstances; however, the court is unable to conclude on the basis of one such example that the County systematically and regularly discriminates against female-dominated jobs in considering requests that job titles be upgraded. Rather, the singularity of this example indicates that it is an aberration.

With respect to the job series of nurses' aides, patient care assistants, and clerical positions, all female-dominated, the court is unable to find evidence of discriminatory intent by the County. As to nurses' aides, recruitment problems have not been significant. Tr. 459-60. As to patient care assistants, there was no evidence that any recruitment or retention problems have ever been encountered. Rather, the plaintiffs adduced evidence that the duties of patient care assistants have become more complex. Tr. 572-73. The court found the testimony on this point to be vague and unpersuasive. Also, as to the clerical job titles, the court did not find that the recruitment problems about which the plaintiffs adduced testimony were so clear as to suggest that the County was disregarding its own criteria in denying upgrades to these positions. Compare Tr. 528-31 with PX 1096 at 36. The treatment of these three job series does not furnish a basis for an inference of discriminatory intent.

The plaintiffs contrast all these instances of denied upgrade requests in female-dominated job titles to instances of granted requests in male-dominated and in mixed job titles. Thus, for example, titles in the job series of veterans counselor have

been upgraded—as have job titles for pharmacists, public health engineers, environmental chemists, ambulance medical technicians, computer programmers, and automotive maintenance coordinators. See PX 587, PX 608, Tr. 922, Tr. 920, PX 608, DX C-40, Tr. 1336-40, and PX 389. However, these upgradings are probative only of the fact that the County does change salary grades—and, hence, salaries—when recruitment and retention problems or when changes in job duties so merit. That these male-dominated and mixed titles have been upgraded would be probative of discriminatory intent by the County if female-dominated jobs that had similar justifying reasons were denied upgrades or the equivalent of upgrades—that is, increases in salary. But the fact that such female-dominated jobs as caseworkers, social welfare examiners, dietitians, and therapists have experienced salary increases—albeit not through the form of upgrades—in response to similar problems does not indicate any discrimination by the County. Rather, it indicates precisely what one would expect: that when the County experiences difficulty in hiring and retaining qualified employees, the County adjusts the compensation of those employees in order to remain competitive in the local labor market. The fact that some of these pay increases are through the form of upgrades while others are in forms more narrowly tailored to address a particular problem (for instance, the institution of above-step hiring to meet recruiting needs) is clearly of no consequence: In either event, salaries are increased. Indeed, the County employees who have been responsible for the evaluation of upgrade requests flatly denied that the sex of job title incumbents has ever entered into any such compensation decision. See, e.g., Tr. 435, 946, 1279-80, 1858- 59; see also

PX 1096 at 70-71. Again, this testimony is consistent with the other evidence presented.

C. Statistical Analyses of Current Salaries

The plaintiffs introduced extensive expert testimony to demonstrate that there is at present a significant disparity in salaries between male-dominated jobs and female-dominated jobs in Nassau County. Their expert also testified that this compensation disparity correlates to a statistically significant degree with the sex composition of the jobs. On the bases of multiple regression analyses, the plaintiffs' expert attempted to demonstrate that the compensation disparity was understandable only with reference to the sex of Nassau County job incumbents. The defendants, however, introduced expert testimony in order to demonstrate that the present compensation disparity in Nassau County jobs was better explained by such factors as the labor market and the number of hours worked each week by employees. The court makes the following findings of fact with respect to the testimony of these experts.

1. Dr. Michelson's Report

The plaintiffs' expert witness on the matter of current salaries in Nassau County was Dr. Stephan Michelson, an economist and consultant who has appeared as an expert witness in many Title VII actions. Notwithstanding that in opening remarks plaintiffs' counsel promised that Dr. Michelson would provide compelling evidence of discrimination, Tr. 13-14, and notwithstanding that the plaintiffs paid Dr. Michelson over $850,000.00 in fees even before this trial began, the plaintiffs have since tempered their

estimation of the comparable worth of Dr. Michelson's services. See, e.g., Plaintiffs' Post-Trial Brief at 30 (statistical analyses by Dr. Michelson "not critical to the outcome in this case"); see also Tr. 2154 (argument of plaintiffs' counsel to court that "[t]his case ultimately shouldn't turn on statistics"). The plaintiffs' reevaluation of Dr. Michelson is prudent: Dr. Michelson proved to be as evasive a witness as Dr. Treiman. See, e.g., Tr. 113-14, 132-138, and 144-48.

Dr. Michelson initially submitted a report to the plaintiffs on February 20, 1989; on November 1, 1989, he revised that report by means of appendices "F" and "G" to the original report. PX 1057 (report of Dr. Michelson to plaintiffs, dated November 1989 and entitled: "A Study of Salary Rate Differences Between Male and Female Employees of Nassau County, N.Y."). Dr. Michelson himself appears to believe that the revisions of his new report greatly enhance the quality of the initial study: "The result of these refinements is to make this presentation ... the most exacting model of a salary system, using the most error-free data set, ever presented in litigation." PX 1057 at G-3. In any event, the revisions to Dr. Michelson's first report certainly had the effect of reducing the salary differentials that he attributed to sex. Tr. 132. To the extent that these reports are inconsistent, the court will consider his revised report as superseding his initial report.

Dr. Michelson undertook to evaluate the salaries of "historically" male-dominated jobs and "historically" female-dominated jobs (although he conceded to the court that he had no adequate bases on which to characterize job titles as "historically" male- or female-dominated). Tr. 13. Dr. Michelson proceeded, as have all persons involved in this case,

on the arbitrary demarcation established by the plaintiffs as to sex domination: That is, Dr. Michelson accepted as given that a job title comprised of 70% women is "female-dominated" but that a job title with 69% women is "mixed." Tr. 13-14 and 114.

Dr. Michelson considered the mean salaries for Nassau County employees in the years 1983 and 1986. Tr. 9. He found that the raw difference in the average salaries of male-dominated jobs and of female-dominated jobs was $7,873 in 1983 and $9,166 in 1986. Tr. 15. Dr. Michelson then undertook to subject these "raw differences" to multiple regression analysis. Principally, Dr. Michelson sought to determine how much of these basic disparities were attributable to differences in the descriptions for the Nassau County job titles—the bases on which the Cresap team had ultimately evaluated jobs and assigned salary grades. In his final analysis—with Nassau County police officers considered separately (because they have a separate pay system, Tr. 29-30) but with job descriptions accounted for—Dr. Michelson found that the difference between the average salary of male-dominated jobs and the average salary of female-dominated jobs was $2,473 in 1983 and $3,298 in 1986. Tr. 16; PX 1057 at G-20. Cast in slightly different terms, Dr. Michelson found—again, with police considered separately and with job descriptions accounted for—that every percentage point increase of females in a Nassau County career line corresponded to a decrease in salary of $31 in 1983 and of $42 in 1986. PX 1057 at G-21. Dr. Michelson testified that these sex-associated differences in salaries are not random. Tr. 104-05. Rather, Dr. Michelson found that the

salary disparity in Nassau County is clearly related to the sex of Nassau County employees. Tr. 104-05, PX 1057 at 2.

The methodology of Dr. Michelson's study was to analyze Nassau County job descriptions and to try to create an independent variable for every aspect of these specifications that have a bearing on salaries. He noted that, although the Cresap team formally evaluated each job on the basis of four factors, these factors could be subsumed, in his opinion, under two groups: (1) factors that concern characteristics of the employee sought for the job (such as education and experience); and (2) characteristics of the job itself (such as complexity of duties and supervisory responsibility). Tr. 31. Dr. Michelson also recognized, aside from the job descriptions, that the seniority of employees has an effect on salary, and he attempted to account for that fact in his regression analyses. PX 1057 at 133. But his principal task was to evaluate the effect that the characteristics of the Nassau County job descriptions have on the critical dependent variable against which all aspects of this lawsuit are measured—salary. It was therefore the objective of Dr. Michelson to account for as many of these characteristics as was both possible and appropriate. PX 1057 at G-21 to G-22.

In the formulation of his data base, Dr. Michelson began with the decision to analyze "career lines" rather than separate job titles. Tr. 34-35. Thus, rather than consider separately the jobs of Probation Officer Trainee, Probation Officer I, Probation Officer II, Probation Officer Supervisor I, and the rest of the probation officer jobs separately, he evaluated the entire probation officer career line as one unit. Dr. Michelson also testified that, in Nassau County job titles, most women

are in female-dominated career lines and most men are in male-dominated career lines. Tr. 53.

As noted, the most significant aspect of Dr. Michelson's study was his derivation of independent variables from the Nassau County job descriptions. With the aid of the "writer's manual" produced by Cresap to train the Nassau County team to write job descriptions, PX 620, Dr. Michelson translated the language of these title specifications into several dozen independent variables. Tr. 60. For example, many job specifications indicate that a particular job title requires a certain degree of knowledge about certain subject matter. If the specification indicated that the title required only some or no knowledge about certain subject matter, Dr. Michelson recorded the variable "KNOW01" for that job. If the job specification indicated that "knowledge" simpliciter was required, he coded it as "KNOW2". The variable "KNOW3" and "KNOW4" represented job specification language of "considerable knowledge" and of "thorough knowledge" respectively. PX 1057 at G-5; Tr. 60; see also PX 1057 at 100-01 and at G-4 to G-5 (comprehensive lists of independent variables). Dr. Michelson conceded that he did not attempt to code every "minute variation" in the language of the job specification and also that such coding of language required subjective judgments, Tr. 73-75; nonetheless, he testified that, in his opinion, he had accounted for all variables that had explanatory power with respect to the salary differentials he had earlier identified. Tr. 77.

Again, after coding the language of the job specifications—both the characteristics of the job itself and the characteristics of the person required for the job—into

independent variables and after accounting as well for seniority, Dr. Michelson concluded that:

> [S]ome of the salary differential is explained by characteristics held differently by males and females, and gained (arguably and assumedly) independent of the actions of Nassau County. Some of the salary differential is explained by differences in the specifications of the jobs males and females are in. However, ... neither individual nor job characteristics explain all of the sex-related salary differences. Salary appears to be related to gender itself.

PX 1057 at 1-2.

Although the scope of Dr. Michelson's undertaking in this project was ambitious, certain methodological shortcomings prevent this court from assigning more than minimal weight to his conclusions. As a threshold matter, the court must discount somewhat Dr. Michelson's own assertions that he accounted for all statistically significant variables in his regression analysis. He himself testified that he had to revise his initial report because he concluded that important variables had not been considered. Certainly he would not have submitted his initial report as "final" in February of 1989 did he not believe then that it was comprehensive. He also characterized the process of identifying and of coding significant aspects of the job specifications as "unending." Tr. 20.

Perhaps one of the most troubling aspects of Dr. Michelson's study is that, even though he himself did not personally code any of the job specifications, and even though

he acknowledges that the coding process required subjective judgments, he did not record any of these judgments for subsequent review or evaluation. Tr. 216. In fact, despite his insistence to the contrary, Dr. Michelson made clear on cross-examination that he cannot now determine whether or not his staff followed his instructions in the coding process because he does not know what instructions he gave. Thus, for example, on the question of how to code the phrase "prepares progress reports", the following exchange took place:

> Q. Do you know whether in every case where your staff saw the language "prepares progress reports," they coded it as communication?
>
> A. No, I only know they either did or didn't.
>
> Q. In fact, you are not sure as you sit here today whether it was coded at all, isn't that correct?
>
> A. If it was coded at all, either as zero or one, that is, it was consistently handled upon instruction from me but I can't recall that instruction or most of them.
>
> Q. You can't as you sit here tell us today whether any particular instruction was followed or not, isn't that correct?
>
> A. Oh, no, we could look at volume 4 of the supplement [to the November 1, 1989 report] and find out exactly how this was coded and then the question is whenever we see these records, prepares program [sic] reports, will it be coded the same. It will be coded the same but I can't tell you which way.

> Q. And you can't tell what instruction was given?
>
> A. Yes, I can tell. If we look at the supplement, we will see whether it was or was not coded and that is the instruction that was given.

Tr. 216-17. In other words, because he failed to record instructions to his staff, Dr. Michelson has no way to determine what a particular coding instruction was other than to review the results of the work of his staff; but he also has no way to verify that his staff followed that instruction other than to review the same information. In order to investigate, then, whether Dr. Michelson's staff consistently followed the instructions that he gave them on certain "judgment calls", it becomes necessary to assume that Dr. Michelson's staff consistently followed the instructions that he gave them on those matters. Apparently, Dr. Michelson does not even entertain the possibility that his staff may have consistently misunderstood or misapplied his directions on a given question. In any event, without records of those directions, it is not possible to assess the quality of such codings by Dr. Michelson's staff—even though Dr. Michelson acknowledged that the results of the coding process depend in part on who does the coding. Tr. 237. Indeed, Dr. Michelson himself concedes that, without those records of his coding rules, there is no way to know that any other expert could replicate—and, therefore, verify—his study. Tr. 235-36.

Furthermore, the court found that the manner in which Dr. Michelson—or, more precisely, his staff, Tr. 189-90—coded certain specifications to be of dubious legitimacy. For example, the job specifications for Nassau County police officers indicate that an incumbent must "develop skill in the use of firearms." Tr. 175. Accordingly, Dr. Michelson did not

code this job for the ability to use a gun but for the ability to learn to use a gun. Tr. 178. However, again following the precise language of the job specifications, Dr. Michelson did code supervisory police positions for the attribute of ability to use a gun. Tr. 191. In other words, on Dr. Michelson's model, a police officer who patrols the streets of Nassau County is deemed to have the attribute of the capacity to learn to use a gun, but his captain at headquarters is recorded for the attribute of active use of a gun. Insofar as Dr. Michelson acknowledged that he and his staff had at times made subjective judgments in the coding process, the court cannot help but wonder whether a modicum of common sense in instances such as this might have produced a more "exacting model" of the Nassau County salary system.

Next, Dr. Michelson testified that he had used only two sources of data: job specifications and personal information about employees. Thus, other than sex, seniority, and salary, Dr. Michelson claimed to have considered nothing that was not contained in a Nassau County job specification. Tr. 160-61. But Dr. Michelson was not consistent in the application of this methodological rule: At times, he coded his own inferences about the characteristics of a job rather than the language of the specification; at other times, he coded phrases of effectively identical significance with different values. Thus, a job title might receive the variable for stress—even if the word "stress" appears nowhere on the job specification. Tr. 185. And, when a career line is considered, such a variable as "stress" may appear in some job codings but not in others. Tr. 246-47. Alternatively, Dr. Michelson coded differently the phrases "receives training" and "ability to learn"—because, as he testified, he inferred a significant

distinction between the two. Tr. 224- 226. And, at times, Dr. Michelson simply did not coded certain phrases in job specifications that clearly have significance as to the setting of salaries. Tr. 209-10 (phrase "ability to carry out oral and written instructions" not coded—and, therefore, not evaluated—as a salary determinant). Such selective departures from his stated methodology undermine the confidence that any reasonable person can have in his conclusions—particularly if one accepts Dr. Michelson's own characterization of his study as an exercise in the coding of key words of uncertain reliability. Tr. 251.

Furthermore, to the extent that he did not stray beyond the four corners of the job specifications, Tr. 267-70, he failed to account for obvious and important influences on the salaries of particular job titles. For example, Vito Competiello, a participant in the Cresap process, testified that the members of the Nassau County job evaluation team had considered such non-Cresap factors as the working conditions of a particular job, Tr. 322-23; and Adele Leonard, the Executive Director of the Civil Service Commission throughout the entire period relevant to this action, indicated that working conditions affect decisions as to salary upgrades, PX 1096 at 9. But Dr. Michelson's study took no account of this aspect of a particular job title or career line. Thus, Dr. Michelson coded the job specification for the title of Morgue Attendant I with the variables that captured these factors: "graduation from high school", "use of electric saw", and "direct supervision." Tr. 213-14. Dr. Michelson disregarded entirely the fact that a morgue attendant works with—and on—cadavers. Tr. 214. The court does not doubt that such circumstances of the job were carefully considered in the setting of salary grades during

the Cresap process and continue to influence salary grade determinations. Tr. 325, 365- 66; see also PX 1096 at 9 (testimony of Adele Leonard as to working conditions of morgue attendant: "It's never been too desirable, bring a body in and see the maggots running out of it."). Similarly, when Dr. Michelson coded the job description for the job of assistant detective investigator, he did not assess the fact that an incumbent of this job would be responsible for confidential information. Tr. 215. Dr. Michelson's model took no account of these important considerations—such as whether a career line required work indoors or outside, whether it required work in a prison or underground, or whether it required working with the living or the dead.

Dr. Michelson's multiple regression analysis also did not account for the fact that salaries in Nassau County are affected by the collective bargaining process—even though Dr. Michelson himself acknowledged that such negotiations are an "influence" on Nassau County salaries. Tr. 147; see also Tr. 145. In fact, Dr. Michelson revealed on cross-examination that he knew nothing about the collective bargaining process in Nassau County other than that it affects the salaries of the jobs which his model was intended to study:

> Q: Do you strive to have your model reflect the real world as close as you possibly can?
>
> A: Yes.
>
> ....
>
> Q: Dr. Michelson, do you understand that over the last 22 years, salaries in Nassau County were arrived at through a collective bargaining process?

A: At the dollar level, yes, it's my understanding.

Q: Are you aware that there have been a series of collective bargaining agreements that have governed the relationship between the CSEA and the County of Nassau throughout the period?

A: Yes, there are collective bargaining agreements.

Q: Have you ever examined any of those collective bargaining agreements?

A: No.

Q: Did you ever ask for any information about the collective bargaining process in Nassau County?

A: No.

Q: Did you ever receive any information as to how the collective bargaining process impacts on salaries in Nassau County?

A: No.

Tr. 144-45. And the evasiveness with which Dr. Michelson ultimately indicated that he had failed entirely to include the collective bargaining process among the dozens of independent variables in his multiple regression analysis is telling not only of the obvious limitations on his study but also of the quality of his testimony generally:

Q: So as you sit here today you have absolutely no idea of the impact of collective bargaining negotiations on the county's wage setting, is that correct?

A: No, that is completely incorrect.

Q: Isn't the collective bargaining process a variable that could affect the real world model of salaries in Nassau County?

A: I can't answer that question as phrased.

Q: You didn't examine any variable for collective bargaining in you model, did you?

A: Well, effectively, I did.

THE COURT: Dr. Michelson, with all due respect, sir, I'm having difficulty understanding your answers. Did you or did you not consider the collective bargaining process as one of the variables?

...

THE WITNESS: There are two things.

THE COURT: Let me ask the question again[.] [I]f you can answer it yes or no, please do so. Did you consider the collective bargaining process as a variable in the study which you've conducted?

THE WITNESS: No.

THE COURT: Do you regard it as a variable in determining the real world status of wage determinations?

THE WITNESS: I regard it as an influence, of course.

THE COURT: Is influence the same as variable?

THE WITNESS: No, I don't know how to measure it as a variable.

> THE COURT: Doesn't a variable have an influence on the result of your study?
>
> THE WITNESS: I hope so but I have to be able to measure.
>
> THE COURT: Do[ ] variable and influence mean essentially the same thing [.] That is, if you introduce a variable, it influenced the result, is that right?
>
> THE WITNESS: Yes.

Tr. 146-48. In other words, although Dr. Michelson was aware of the critical role that the collective bargaining process has had in the Nassau County compensation system, he did not undertake even a brief investigation of it, and he deliberately omitted the results of that process from his study because he did not "know how to measure it as a variable." With such a significant—and, indeed, intentional—omission from his study, this court cannot conclude that Dr. Michelson's multiple regression analysis is a reliable study of salary determinants in Nassau County job titles.

Along the lines of omitted salary determinants, the defendants sought to make much of the fact that Dr. Michelson had included no variable to represent the number of hours that Nassau County employees work each week. Tr. 150-51. In fact, Dr. Michelson was completely unaware until just a few days before the start of trial that employees in different Nassau County departments work 33 and three-quarters hours each week or 35 hours each week or 40 hours each week. Tr. 153. However, the evidence produced later in the trial unequivocally established that the number of hours worked each week in no way affects the salaries of County employees:

A clerk in one department who works 35 hours each week is paid the same salary as a clerk in another department who works 40 hours each week. Tr. 1442; see also Tr. 326 and 936-37. For this reason, the omission of a variable to represent the length of County work weeks—as well as Dr. Michelson's ignorance of the fact of different work weeks—is of absolutely no significance.

What is of significance—indeed, of great significance—is the complete failure of Dr. Michelson's study to account for the effect of market forces on the present salary disparity in Nassau County. Dr. Michelson plainly admitted that he did not introduce any variable into his regression analyses to represent market salaries. Tr. 109-10. In fact, Dr. Michelson testified that he could not conclude that the forces of the market do not have an effect on Nassau County salaries. Tr. 110. This omission severely undermines the value of Dr. Michelson's report: Although the court found that there is no satisfactory evidence that the County relied on market salary information in the execution of the Cresap process to assign salary grades to particular jobs, the court does find that there is substantial evidence of reliance on the market by the County (and by the plaintiffs) since the end of Cresap. The two means through which salary grades are reviewed and modified rely heavily on labor market information. First, the Civil Service Commission regularly evaluates upgrade requests by gathering information from nearby communities as to the "going rates" for particular job titles. Tr. 914-15; see also Tr. 1852. Second, both the County and the plaintiffs amass labor market data every time they negotiate collective bargaining agreements. Tr. 1314-17, 1377-79, and 1389. Even the many Nassau County titles that have today the same salary grade

they were assigned in 1967 have been affected by this labor market data: That is, the data collected by the County and by the plaintiffs have been considered in decisions not to change original salary grades—as well as in decisions to change actual salaries through such means as above-step hiring or mass promotions. Because salary grades for individual job titles are regularly upgraded—or left unchanged—on the basis of such information, this court must conclude that the market is among the principal factors that affect salaries in the post-Cresap compensation system. Accordingly, the failure of Dr. Michelson even to entertain a market variable in his study effects a serious undermining of confidence in his conclusions.

Moreover, one of the defendants' expert witnesses, Dr. Haworth, testified credibly and persuasively that the sex-related salary differential identified by Dr. Michelson is reduced to virtual insignificance when a market variable is introduced. Tr. 2009. Dr. Haworth used a data base similar to that of Dr. Michelson, Tr. 1885-96—with necessary and appropriate modifications such as the elimination of job classes for which no market data were available, Tr. 1895—and confirmed, as a threshold matter, that the information on job specifications is correlated to salary and also that there is indeed a gap between the salaries of men and women in Nassau County that is not explained by job specifications alone. Tr. 2008; see also DX KKK-12. When a market variable was added to the regression analysis, however, Dr. Haworth found that "there is a difference in men and women's salaries that is either [a] very small negative and not significantly different from zero or that is positive in favor of women." Tr. 2009. She also found that Dr. Michelson's data set—predicated as it was solely on the features of job

specifications—was a poor predictor of actual market salaries in the communities surrounding Nassau County. Tr. 2009-10.

In the final analysis, the court is unable to give any weight to the report and the testimony of Dr. Michelson. His study reveals serious methodological flaws: He failed to record significant decisions in his coding process; indeed, combined with the fact that he claimed to be unable to recall instructions to his staff, that failure to preserve his methodology frustrated this court in attempting to assess the trustworthiness of his "exacting model." Further, he selectively departed from his own "rules" as to coding job specifications; he made trivial terminological distinctions in some cases and failed to evaluate his work against common sense in others. Moreover, because Dr. Michelson intended his model to conform only to Nassau County job descriptions and not to "reality", Tr. 228-29, he took no account of such salary determinants as the collective bargaining process and working conditions—the latter of which is a factor that employees of the Nassau County Civil Service Commission testified was significant in the Cresap process and has been significant ever since. Finally, Dr. Michelson's multiple regression analysis, with over seventy independent variables, completely ignored the forces of the market despite the fact there was ample testimony as to the significance of the market in salary decisions since the end of the Cresap process. The results of Dr. Haworth's refinements to Dr. Michelson's regression analysis confirm that the labor market is a determinant of salary in Nassau County of which Dr. Michelson should have taken account. Her analysis also demonstrates that the labor market variable may well explain the salary differential that Dr. Michelson attributed to the sex dominance of job titles and of career lines.

For all these reasons, the court finds that Dr. Michelson's testimony is not probative of discriminatory intent.

2. Dr. Haworth's Report

Dr. Haworth also conducted two studies on behalf of the defendants in an attempt to investigate whether current salary decisions in Nassau County are adverse to women and also to investigate how current salaries for men and women in Nassau County compare to salaries in the local and national labor markets. Tr. 1880-83. The results of Dr. Haworth's study—results found by this court to be both reliable and persuasive—undermine any notion that the present Nassau County compensation system is discriminatory with respect to women in female-dominated jobs.

For her studies, Dr. Haworth used a data base that was essentially a subset of Dr. Michelson's data base and similar to the data base of 101 job titles derived by Dr. Jones. Tr. 1896. Among other modifications, Dr. Haworth eliminated from Dr. Michelson's data base all job titles of salary grade 15 or greater—simply because labor market data were unavailable for these jobs. Tr. 1895. She also eliminated all jobs for which the incumbents are not represented by the plaintiff CSEA; this included the elimination of all police titles and all titles of personnel at the Nassau County Community College. Tr. 1895. In order to correlate Nassau County jobs to jobs in the national market, Dr. Haworth used the Standard Occupational Classification Manual. Tr. 1904. Dr. Haworth collected national labor market data for her study, and she also used many of the local labor market data collected by Dr. Jones in his evaluation of Dr. Treiman's "training and experience" study. Tr. 1907 and 1942-43.

Dr. Haworth first analyzed the changes in the female composition of the Nassau County workforce between 1980 and 1986. Tr. 1910; DX GGG-1 at 14. She found that there was a substantial increase in the number of women during that period. She also found that changes in female composition of five percent or more were more often increases in the female composition of jobs than decreases. Tr. 1911. Further, after analyzing the 26 Nassau County job titles in her data base for which there had been changes of five percent or more in female composition between 1980 and 1986, Dr. Haworth found that these changes had the effects of increasing the number of female-dominated jobs in Nassau County and of increasing the number of mixed jobs in Nassau County—but not of increasing the number of male-dominated jobs in Nassau County. Tr. 1915-16; DX GGG-1 at 17.

However, Dr. Haworth also evaluated the salary range midpoints for Nassau County jobs, and she found that Nassau County jobs that had increases in the percentage of female composition during this period also had higher relative increases in salary than did those jobs that did not have increases in the percentage of women. Tr. 1930; DX GGG-12. This was true both for those job titles that did not have salary grade changes between 1980 and 1986 and for those jobs that were regraded. Tr. 1932-35. In other words, Dr. Haworth found that between 1980 and 1986, as jobs acquired higher percentages of female employees, the job titles themselves became better compensated. Tr. 1937. Dr. Haworth concluded that the dynamics of the salary-setting process in Nassau County—whether it be through collective bargaining or through upgrades—was not adverse to jobs that had increasingly larger female representation. Tr. 1932.

Finally, Dr. Haworth compared these findings for Nassau County to the labor market data she had assembled for the national and local markets. Tr. 1938; DX GGG-13; DX GGG-14. Dr. Haworth found no pattern adverse to women in her comparisons with the local labor market. Tr. 1951-52; DX GGG-14. And, as to the national labor market, Dr. Haworth found that female-dominated jobs have higher salaries in Nassau County than do female-dominated jobs in the nation as a whole; however, she found that male-dominated jobs have lower salaries in Nassau County than they do in the national market. Tr. 1948; DX GGG-13. Ultimately, Dr. Haworth concluded that the phenomenon of male-dominance and of female-dominance of job titles in Nassau County was not significantly different from that which is found in the local and national labor markets, that the Nassau County salary-setting process between 1980 and 1986 has not been adverse to jobs with increasing female composition, and that she could find no statistical evidence of sex discrimination in the Nassau County compensation system. Tr. 2030-32.

The court finds Dr. Haworth's report and testimony to be reliable and credible. The methodology of her study was clearly conceived and consistently followed. The court found the procedures by which she defined her data base and gathered her labor market information to be straightforward and sound. Unlike the plaintiffs' experts, Dr. Haworth was candid about the limitations of her procedures, and she incorporated cautions about those limitations into her findings. Throughout the course of her testimony, Dr. Haworth was direct and credible in her answers. Accordingly, the court gives great weight to her conclusions.

Thus, the court finds that the conclusions of Dr. Haworth undermine any inference of discriminatory intent by the County of Nassau that the plaintiffs would have this court draw from the present status of the County compensation system. Although Dr. Haworth did not restrict her analysis to jobs that were female-dominated, she persuasively demonstrated that as job titles take on higher percentages of women, the pay for those jobs increases relative to other jobs. This fact is obviously inconsistent with the argument of the plaintiffs that the County discriminates against women in female-dominated jobs. Furthermore, Dr. Haworth demonstrated that salaries for male-dominated, mixed, and female-dominated jobs in Nassau County parallel those found in the communities that surround Nassau County—and that they are more favorable to women than those found in the nation as a whole. As the court has indicated already, there is extensive evidence in this record to show that Nassau County gives great weight to these labor markets in its current compensation decisions. The findings of Dr. Haworth demonstrate that this labor-market reliance of the County has not adversely affected the plaintiffs in this action.

3. Conclusions as to Statistical Analyses

On the whole, then, the statistical analyses of present Nassau County salaries do not demonstrate that the County has discriminated—or that it continues to discriminate—against female-dominated jobs. The only statistical report to support that proposition—that is, the report of Dr. Michelson—is unreliable and inadequate. Rather, the evidence reveals that the apparent sex-related disparity in Nassau County is driven by the forces of the labor market—forces to which Nassau County gives no little weight

in compensation determinations. Furthermore, the salary-setting process has, at least between 1980 and 1986, benefited those jobs that have increased their total percentage of female incumbents in a manner plainly inconsistent with intentional sex discrimination. For all these reasons, and on the basis of the report of Dr. Haworth, the court finds that statistical analyses of Nassau County salaries do not support an inference of sex discrimination against women in female-dominated job titles.

D. Other Evidence Relevant to Discriminatory Intent

Other evidence introduced by the plaintiffs to demonstrate discriminatory intent on the part of Nassau County included evidence concerning sex segregation of Nassau County job titles and anecdotal testimony as to the animus of certain County officials. On the question of intent, the defendants presented evidence as to the bona fides of the Nassau County affirmative action plan and about the dynamics of the collective bargaining process between the County and the plaintiff CSEA.

1. Sex Segregation of County Job Titles

The plaintiffs undertook to demonstrate that job titles in Nassau County have been segregated by sex since 1967 and that this sex segregation is attributable at least in part to intentional discrimination by Nassau County. The plaintiffs did not attempt to show that this alleged "steering" of men into male-dominated job titles and of women into female-dominated job titles was in itself a violation of Title VII. Rather, the plaintiffs sought by this evidence to support their claims of intentional discrimination in compensation.

As a threshold matter, the court notes that there is no satisfactory evidence in the record to support the plaintiffs' quantification of sex segregation in the year 1967. Their proof in this regard consisted solely of Dr. Treiman's data as to the 1967 sex composition of job titles in Nassau County. PX 1074 and PX 1075. As noted above, however, the means by which this information was assembled are at least open to question, and the court cannot rely on them with confidence. As to more recent sex segregation, it is beyond dispute that most Nassau County employees are in either female-dominated or male-dominated job titles. Tr. 53 and Tr. 2033-34. Indeed, evidence produced by the defendants' experts indicates that the Nassau County work force is more sex segregated than is the national work force. DX GGG-1 at Table 8A. However, there is no persuasive indication that the sex segregation of County jobs as it exists today was in any manner effected by the defendants.

The plaintiffs established that the County has, in a very few instances in the past, restricted particular job titles either to men or to women. Thus, for example, the jobs of domestic workers and of custodial workers were formerly sex segregated. See PX 278, PX 279, and PX 285; Tr. 412. There have also been male-only clerical jobs, PX 565; and such positions as police officers, correction officers, and probation officers have been effectively closed to women as late as the 1970s. PX 1096 at 22-23 and 34-35; Tr. 1290 and 1491. Since those formal barriers were eliminated, however, the County has not directed men and women to particular job titles. Tr. 473-74 and 1271-72. Rather, the County maintains an open system for its competitive and non-competitive positions. Tr. 1233, 1249, 1271-72, and 1279. Indeed, the fact that women

from the female-dominated caseworker career line have moved in great numbers to the previously male-dominated—but now predominantly female—probation officer career line readily illustrates the absence of deliberate sex segregation in the County today. Tr. 452, 1276-78, and 1412.

Indeed, the better explanation for the existing sex segregation in Nassau County job titles is that which was agreed upon by all the experts who testified in this case: that men and women do not, on the whole, seek the same positions. Thus, Dr. Michelson testified that "females offer themselves to work on the average [in] a different set of jobs than men offer themselves to work...." Tr. 167. Similarly, Dr. Treiman testified that socialization is a significant factor in the establishment of de facto sex segregation in the work place. Tr. 868-79. And Drs. Jones and Haworth indicated that such individual choices by employees as to what jobs they will apply for—choices that are often correlated to sex—obviously constrain the extent to which an employer can integrate particular job titles. DX ZZZ-6 at 50-51; Tr. 1983-84.

Accordingly, the court finds that the sex segregation in Nassau County job titles—the existence of which the plaintiffs have certainly demonstrated—is not the product of deliberate efforts by the County to steer or to direct men into male-dominated jobs or women into female-dominated jobs. Rather, it is the product of sex-related preferences on the part of the Nassau County employees themselves. As such, the mere fact that most Nassau County employees work in job titles that are either female-dominated or male-dominated does not in itself support an inference of discriminatory intent.

2. Anecdotal Evidence of Animus

Although the plaintiffs in opening remarks promised significant anecdotal evidence in order "to bring [the statistical evidence] to life," Tr. 35, they ultimately presented very little testimony by individuals that was significantly probative of the question of discriminatory intent on the part of Nassau County or of its officials. Six of these witnesses testified only that they thought their own job titles were under-compensated relative to other job titles, that the duties of their job titles merited upgrades, or that recruitment and retention problems in their job titles were severe. Thus, Linda Kelly, a police communications operator, testified as to the duties entailed by her job title. Tr. 1085-1148. Beth Luttinger testified that the job duties of the social welfare examiner position have become more complex over the years but that the position has not been upgraded. Tr. 507-14. Susan Duffe testified that upgrades and other salary increases have not alleviated a shortage of registered nurses. Tr. 564-72. Bryn Catapano testified as to her job duties as an assistant rehabilitation counselor at the Nassau County Correctional Center. Tr. 948-51. Barbara Bledsoe testified about her job as a nurses' aide and about the efforts of those in her job title to secure a salary upgrade. Tr. 1020-1024. And Patricia Madsen testified as to the job duties of a police detention aide. Tr. 1158-76.

The testimony of each of these six witnesses is relevant to particular issues in this action: The evidence provided by Linda Kelly, of Bryn Catapano, and of Patricia Madsen is relevant to the individual claims under Title VII and under the Equal Pay Act; and the evidence provided by Beth Luttinger, Susan Duffe, and of Patricia Madsen is relevant to the response

of the County to requests for upgrades in male-dominated and female-dominated job titles. As such, the testimony of each of these six witnesses is considered in other junctures of these findings. But none of these six witnesses testified to specific instances of conduct by Nassau County officials that are probative of discriminatory animus on the part of the defendants.

Three other witnesses for the plaintiffs, however, did so testify. Ola McCoy testified that her supervisor at the Department of Social Services had bluntly told her that she was ineligible for a particular position because he did not want to see his "ladies pushing a hand truck with boxes." Tr. 958. Alice Groody testified that she had been told in the 1970s that certain jobs in the Nassau County Department of Assessment were strictly "male titles." Tr. 548- 49. Indeed, a rather senior member of that department remarked to her that "[w]omen should be barefoot and pregnant" and that "they did not belong in the work force." Tr. 549-50. And, finally, Sondra Adolf testified that the Fire Marshal had indicated to her that, for female employees, the level of compensation was less important than their availability to care for their children. Tr. 1015.

Obviously, these items of anecdotal evidence are relevant to the question of any animus toward women in Nassau County. However, the testimony of each of these women is of limited probative value. First, the testimony of Ola McCoy revealed nothing more than sexism on the part of one supervisor in the Department of Social Services; it does not imply a sexist animus on the part of the County as a whole. Second, the testimony of Alice Groody concerned stale

incidents from as far back as ten years before this action. Third, the court frankly found the testimony of Sondra Adolf to be vague and not entirely credible. See Tr. 1016-20. Even so, if the testimony of all three women were taken at face value and considered collectively, the plaintiffs would only have adduced evidence of ad hoc sexist remarks by several supervisors in the County; that is, evaluated at their maximal worth, these items of evidence are only minimally probative of systemic discrimination against women in female-dominated positions.

3. The County Affirmative Action Plans

The County introduced evidence as to the existence of its long-standing affirmative action plan in an effort to negate any showing by the plaintiffs of discriminatory intent. Nassau County has had several affirmative action programs since 1972, PX 83 at 5, and it has long assembled data on the race and the sex of its employees as required by the Equal Employment Opportunity Commission. See, e.g., PX 2. The former chairman of the Nassau County Affirmative Action Coordinating Committee, Russell Service, testified that increasing the representation of women in County work titles was among the goals of the affirmative action programs. Tr. 967-68. However, the best efforts by the County to recruit women for County job titles have been extended in compliance with consent decrees. Tr. 971-72, 984, 1291-92, and 1828-34. Furthermore, attempts by the Affirmative Action Coordinating Committee to persuade individual departments to set goals and timetables for the hiring of women have been ignored—and forgotten. Compare Tr. 969-71 with PX 81. Indeed, the authority of the Affirmative Action Coordinating

Committee appears to have been limited by the County to convening meetings and to publishing reports.

Although the state regulation of hiring for competitive positions forecloses many direct efforts to increase the number of women in particular job titles, the County has not specifically undertaken to recruit women for non-competitive positions or for labor positions. Tr. 979-82. Nor has the County particularly encouraged women to sit for competitive examinations in career lines for which female representation is low. Tr. 1291-92; but see PX 1096 at 50-51. Thus, the net increase in the female composition of Nassau County job titles about which Dr. Haworth testified appears to be less the product of affirmative efforts by the County and more the result of larger numbers of women entering the work force.

The court finds that the affirmative action programs of Nassau County neither support nor undermine a finding of discriminatory intent. Although the County appears long ago to have removed formal barriers to women in its job titles, it has done little since then to encourage women to seek employment in those areas. Such a failure to encourage women is not, of course, synonymous with intentional discrimination. Still, the mere existence of these programs cannot be said to negate discriminatory intent: The County has established an Affirmative Action Coordinating Committee, but it has granted to that body neither the resources nor the authority to undertake genuinely affirmative action. Tr. 969. In other words, although the apparent indifference of the County to the ineffectiveness of the Affirmative Action Coordinating Committee does not constitute intentional discrimination by the defendants, neither is it inconsistent with

such discrimination. For this reason, the court finds that the evidence as to the affirmative action programs in Nassau County is not probative of the central issue in this matter.

4. The Collective Bargaining Process

The defendants also introduced evidence concerning their good faith participation in the collective bargaining process with the plaintiff CSEA. Such negotiations have been central to the compensation system in Nassau County since 1969. Tr. 1319. The collective bargaining process effects "across-the-board" pay increases, pay increases for specific groups of job classes, and upgrades for particular titles. Tr. 1310-11 and 1318-19. The County does not adopt negotiating positions on the basis of the sex of incumbents of particular jobs. Tr. 1323-24; DX ZZZ-2. And, at least until the advent of this litigation, CSEA never advanced a sex-related wage proposal during the collective bargaining process. Tr. 1324-27 and 1393-95. Although the plaintiffs attempted to demonstrate that the County grants upgrades to male-dominated jobs during labor-management negotiations far more frequently than it does to female-dominated jobs, Tr. 1362-63 and 1372-76, it is clear that these results have been affected by negotiation strategies adopted by CSEA in contemplation of this litigation. Tr. 1410-11 and 1414-15. On the whole, the court finds ample evidence that the County has consistently engaged in good faith collective bargaining with the plaintiffs and that this conduct by the County is inconsistent with any inference of discriminatory intent as to the compensation of Nassau County employees.

E. Discrimination in Specific Job Titles

On the first day of trial, the plaintiffs indicated that they would present evidence of violations both of Title VII and of the Equal Pay Act as to three specific job groups: police communications operators, police detention aides, and clerical workers at the Nassau County Correctional Center. At the close of proof, the plaintiffs informed the court that they sought relief under the Equal Pay Act only as to one named plaintiff—Linda Kelly, a police communications operator. Plaintiffs' Post-Trial Brief at 51 n. 76. However, the plaintiffs also indicated that they would continue to seek Title VII relief for all class members who were incumbents in these three job groups. Nonetheless, the plaintiffs seek to establish violations of Title VII as to these other two job groups through the standards of the Equal Pay Act. Consistent with the position of the plaintiffs, then, the court considers the job of police communications operator both as to the Equal Pay Act and as to Title VII; but the other jobs are considered ultimately only as to Title VII.

1. Police Communications Operators

The plaintiffs attempted to show that the job skills, efforts, and duties of Nassau County police communications operators are substantially similar to those of Nassau County fire communications technicians. Employees in these positions work in essentially identical conditions, and both positions involve the receipt of emergency and non-emergency telephone calls, the processing of relevant data, and the dispatching of equipment and of personnel. However, the scope of responsibilities and of the requirements for these two positions differ in significant respects.

The position of police communications operator was established in 1973; it is female-dominated, and it has a salary grade of seven. Tr. 1086-93. The position of fire communications technician was also established in 1973; this position has never had a female incumbent. Tr. 1029. The salary grade for the fire communications technician title is nine. PX 672. Neither position has ever been upgraded.

On a typical shift, approximately 20 police communications operators work under the supervision of two police officers. Tr. 1093 and 1143-44. Police communications operators receive emergency calls, record relevant information, dispatch police personnel, and process requests from officers in the field for further information and communications assistance. Tr. 1093-94 and 1108-14. Other duties include administrative work in support of their primary functions. Tr. 1116-17. However, in any one shift, no single police communications operator performs all these tasks; rather, one employee is assigned to dispatch police officers while the other employees either receive and record in-coming emergency calls, staff the police switchboard, or perform administrative tasks. Tr. 1086 and 1143. The evidence was undisputed that police communications operators receive and process many more calls each day than do the fire communications technicians. Tr. 1810-12.

For the most part, four fire communications technicians work on a shift under the supervision of one supervisor. Tr. 1036. Fire communications technicians receive in-coming emergency calls, record and process relevant information, and dispatch personnel and equipment. Tr. 1062- 67. However, unlike police communications operators, fire communications

technicians must integrate these tasks on a regular basis. Tr. 1575-76. That is, each fire communications technician handles any in-coming emergency call alone: The technician must evaluate the nature of the emergency and determine the appropriate response. The technician must dispatch the proper kind and number of fire equipment from one of over 71 volunteer fire departments in Nassau County. Tr. 1061.

Perhaps most significantly, the fire communications technician is required to follow a call through and to provide coordination of responding units in the field. Tr. 1070. Unlike police communications operators who simply process requests from the field, fire communications technicians must make continuing decisions as to the activities of different fire departments throughout the course of an emergency. Tr. 1064 and 1070-71; PX 1096 at 53. Thus, the work of a fire communications technician on any given fire may last from 15 minutes to hours or even days. Tr. 1072. In short, unlike the police communications operators, fire communications technicians are not mere dispatchers and transmitters of information; rather, they must make substantial judgments as to the appropriate response to an emergency and they must provide continuing coordination of equipment and of personnel from different volunteer fire departments around the County. Tr. 1049, 1070-71, and 1576-77; compare with 1147-48.

Furthermore, the requirements for these two jobs are significantly different. The police communications operator title requires two years of experience with telephone or radio communications. Tr. 1086. This requirement reflects the fact that the job responsibilities are essentially those of receiving

and of transmitting information. By contrast, the fire communication technician title requires five years of experience with a Nassau County volunteer fire department. Tr. 1033. This reflects the fact that the position requires a technician to have thorough knowledge of fire fighting equipment as well as an understanding of the complex system under which the 71 independent volunteer fire departments in Nassau County combine to provide the fire fighting resources of the County. Tr. 1061-63. Indeed, the fact that each fire communications technician has had five years of experience with a Nassau County volunteer fire department obviates the need for significant segments of training by the County. Tr. 1080. By contrast, police communications technicians require substantial "on-the-job" training in order to discharge all the duties of their job title. Compare Tr. 1087 with Tr. 1116.

On the whole then, the differences in responsibilities and in independent judgment required for these two positions—as well as the differences in training and in experience—establish that the job titles of police communications operator and of fire communications technician are not substantially similar. For these reasons, the court finds that a comparison of these two jobs is not probative of the allegations set forth in the amended complaint.

As an additional matter in this regard, the court finds that plaintiff Linda Kelly—although nominally a police communications operator—primarily performs the work of a clerk typist. Tr. 1139-43. Indeed, Linda Kelly is compensated by the County as a police communications operator even though, for a period of several years through the time of this litigation, the duties that she has specifically requested have

been the duties of a lower paid clerical position. Tr. 1139-40. The court finds that the willingness of the County to pay Linda Kelly at the rate of a police communications operator while permitting her to work primarily as a clerk typist is flatly inconsistent with an intent to discriminate against her or against the other female incumbents of the police communications operator job title.

2. Police Detention Aides

The position of police detention aide has only female incumbents; it has a salary grade of four. PX 672. Police Detention Aides work at police headquarters with certain police officers—known as "turnkeys"—in the processing, detention, care, and transportation of arrestees. The defendants unsuccessfully attempted to show that the responsibilities of the police detention aide are merely to observe the handling of female detainees by the police officers and to protect the County against claims of inappropriate behavior by those officers. Tr. 1836-37 and 1842; PX 1096 at 59. However, the evidence clearly demonstrated that the positions of police detention aides and of police officers who work as turnkeys are substantially similar and that the salary disparity between these two groups is attributable to intentional discrimination.

Police detention aides and turnkeys are both responsible for searching, monitoring, supervising, and transporting detainees; the only significant difference is that police detention aides are responsible for female arrestees and police officer turn keys are responsible for male arrestees. Tr. 1158 and 1161-66. Even the original job description of the police detention aide position plainly belies the claim of the defendants that the primary duty of a police detention aide is

"to observe" the handling of female arrestees by male police officers. PX 1085. Furthermore, the turnkeys and the police detention aides perform identical clerical duties. Tr. 1165-66.

The defendants placed much emphasis on the facts that a police detention aide never comes into contact with a detainee without the assistance of a police officer and that police detention aides are not permitted to carry guns (as are police officers). However, neither a police detention aide nor a turnkey is permitted to be alone with a detainee. Tr. 1164 and 1175-76. Because the police department only schedules one police detention aide for each shift, it is necessarily the case that observance of this rule by a police detention aide requires the presence of a turnkey whenever she deals directly with a detainee: There is simply no one else on duty except male police officers. Tr. 1159. As to the carrying of guns, the difference is trivial because no one—including male police officers—is permitted to carry a gun in the detention area of the police headquarters. Tr. 1168. Finally, the argument of the defendants that the police detention aides have no formal responsibilities for the transportation of female detainees to court is plainly contradicted by the evidence. Tr. 1166-67.

For all these reasons, the court finds that the work performed by the police detention aides is substantially similar—indeed, with the exception of the sex of the detainees, the work is identical—to that performed by male police officers assigned as turnkeys. Further, the County offered no justification for the disparate salaries paid to these employees who perform identical work; indeed, the County has refused in the past to upgrade the job title of police detention aide. Tr. 1168 and 1173-74. These facts—along with the fact that the County

created the job of police detention aide as a sex-segregated job title, PX 1085—lead the court to find that the County has intentionally discriminated against these police detention aides in paying them substantially less than male police officer turnkeys while requiring of them equal work. However, it is also plain that this single instance of discrimination with respect to compensation that the plaintiffs have proven does not establish a pattern of discrimination by the County; that is, it does not, without more, establish the broader claims of the plaintiffs in this action.

3. Correctional Center Clerks

Finally, the plaintiffs endeavored to show that the County has discriminated against clerical workers at the Nassau County Correctional Center because it has assigned similar clerical duties to certain correction officers who are better compensated. However, almost all the correction officers who are assigned to perform clerical tasks are also required to devote time to the supervision and to the control of inmates. Tr. 826 and 1480-82; but see 1488. The clerical workers perform none of these duties. Tr. 826 and 1481. Because the correction officers have duties that differ significantly in quality from those duties they share with clerical workers, the court finds that the jobs are not substantially similar. Further, the plaintiffs have adduced absolutely no evidence that the County has intentionally discriminated against the female employees in clerical positions at the Nassau County Correctional Center.

CONCLUSIONS OF LAW

I. Title VII Claim of the Plaintiff Class

A. The Governing Law as Applied

Section 703(a) of Title VII of the Civil Rights Act of 1964 provides in relevant part:

> It shall be an unlawful employment practice for an employer—
> (a) ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex ...; or
> (b) to limit, segregate, or classify his employees ... in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's ... sex ....

42 U.S.C. § 2000e-2(a). Thus, Title VII plainly prohibits discrimination in employment on the basis of an employee's sex. A person aggrieved by an unlawful act under Title VII may bring a private action in a federal district court. 42 U.S.C. § 2000e-5(f)(1), (3).

[1] "In most Title VII cases plaintiffs present either a disparate treatment or [a] disparate impact theory of discrimination." *Coser v. Moore,* 587 F.Supp. 572, 576 (E.D.N.Y.1983), *aff'd,* 739 F.2d 746 (2d Cir.1984). In this case, the plaintiffs proceed only on a disparate treatment theory. That is, the plaintiffs endeavor to show that the County of Nassau "simply treats some people less favorably than

others because of their ... sex...." *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977). In such a case, "[p]roof of discriminatory motive is critical...." *Id.* See also *Lowe v. Commack Union Free School District,* 886 F.2d 1364, 1369 (2d Cir.1989) (disparate treatment claim requires proof of " 'employer's subjective intent to discriminate' ") (quoting *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 646, 109 S.Ct. 2115, 2119, 104 L.Ed.2d 733 (1989)), *cert. denied,* 494 U.S. 1026, 110 S.Ct. 1470, 108 L.Ed.2d 608 (1990); *American Federation of State, County, and Municipal Employees, AFL-CIO (AFSCME) v. State of Washington,* 770 F.2d 1401, 1406 (9th Cir.1985). The requisite discriminatory intent, however, may "in some situations be inferred from the mere fact of differences in treatment." *International Brotherhood of Teamsters,* 431 U.S. at 335 n. 15, 97 S.Ct. at 1854 n. 15. See also *AFSCME v. Washington,* 770 F.2d at 1406 ("In an appropriate case, the necessary discriminatory animus may be inferred from circumstantial evidence."). Nonetheless, what is to be established by the plaintiffs is that the County treated them differently *because* they are women. *California State Employees' Association (CSEA) v. State of California,* 724 F.Supp. 717, 731 (N.D.Cal.1989); see also *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) v. State of Michigan,* 886 F.2d 766, 770 (6th Cir.1989) (failure of employer to change compensation system must be shown to have been motivated "at least in part by a desire to benefit one sex at the expense of the other").

[2] Because they bring this Title VII suit as a class action that challenges a "pattern and practice" of discrimination by

the County, the plaintiffs must establish that sex discrimination is the "standard operating procedure—the regular rather than the unusual practice" of the defendants. *International Brotherhood of Teamsters,* 431 U.S. at 336, 97 S.Ct. at 1855; see also *Coser v. Moore,* 739 F.2d 746, 749 (2d Cir. 1984). The "mere occurrence of isolated or 'accidental' or sporadic discriminatory acts" is an inadequate predicate for Title VII liability in such an action. *International Brotherhood of Teamsters,* 431 U.S. at 336, 97 S.Ct. at 1855; see also *Ottaviani v. State University of New York at New Paltz,* 679 F.Supp. 288, 297, *aff'd,* 875 F.2d 365 (2d Cir.1989), *cert. denied,* 493 U.S. 1021, 110 S.Ct. 721, 107 L.Ed.2d 740 (1990).

The "basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment" have been set forth clearly by the Supreme Court. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 252, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981). That is:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for [the employer's action]".... Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Id. at 252-53, 101 S.Ct. at 1093 (quoting *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973)). However, the Court has also cautioned that the "prima facie case method ... was 'never intended to be rigid, mechanized, or ritualistic.'" *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 715, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983) (quoting *Furnco Construction Co. v. Waters,* 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978). Thus, once the defendant has presented evidence, the question of whether the plaintiff has established a prima facie case of discrimination is irrelevant: At that point, the court has all the evidence probative of the ultimate factual issue in a Title VII disparate treatment case—whether "the defendant intentionally discriminated against the plaintiff." *Aikens,* 460 U.S. at 715, 103 S.Ct. at 1482 (quoting *Burdine,* 450 U.S. at 253, 101 S.Ct. at 1093).

[3] After trial, the plaintiffs refined their theory of this case: Their primary argument is that they have established unlawful discrimination under a hybrid of *County of Washington, Oregon v. Gunther,* 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981), and of *Bazemore v. Friday,* 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986). Tr. 2131. The formal holding of *Gunther* was that the Bennett Amendment, 42 U.S.C. § 2000e-2(h), did not restrict liability for sex discrimination under Title VII to claims of "equal pay for equal work." *Gunther,* 452 U.S. at 180, 101 S.Ct. at 2253. However, *Gunther* also obliquely indicated that proof of sex discrimination in compensation could be established by a showing that an employer discriminatorily departed from its own wage-setting methodology. *Id.* at 180-81, 101 S.Ct. at 2253-54; but see *id.* at 166 n. 8, 101 S.Ct. at 2246 n. 8 ("We

are not called upon in this case to decide whether respondents have stated a prima facie case of sex discrimination in Title VII."). Despite the guarded language of *Gunther*—that is, despite the fact that the Supreme Court stated that the plaintiffs there had indicated they could show the employer's departure from its wage-setting methodology to have been motivated by discrimination—courts have read *Gunther* as though discrimination is shown by a departure in itself. See Merrill v. Southern Methodist University, 806 F.2d 600, 607 (5th Cir.1986) (characterizing *Gunther* as case in which "it was shown that the employers unexplainedly departed from objective pay criteria they had adopted"); see also *Plemer v. Parsons-Gilbane,* 713 F.2d 1127, 1133 (5th Cir.1983) (plaintiffs in *Gunther* had offered "the clearest evidence of discrimination"). However, *Gunther* still requires the showing of intentional discrimination by an employer:

> All that [*Gunther*] seems to mean, as the dissenting Justices pointed out, is "that even absent a showing of equal work, there is a cause of action under Title VII when there is direct evidence that an employer *intentionally* depressed a woman's salary because she is a woman."
>
> *American Nurses' Association v. State of Illinois,* 783 F.2d 716, 721 (7th Cir.1986) (quoting *Gunther,* 452 U.S. at 204, 101 S.Ct. at 2265 (Rehnquist, J. dissenting)); see also *AFSCME v. County of Nassau,* 609 F.Supp. at 709 (*Gunther* established that plaintiffs could use evidence regarding departures from wage-setting systems "to prove intentional discrimination"). In any

> event, *Gunther* and its progeny certainly make clear that a departure by an employer from a wage-setting methodology with the intention of treating female employees adversely constitutes a violation of Title VII. Such is precisely the discrimination the plaintiffs here sought to prove.

[4] Second, the plaintiffs predicate this action on the holding in *Bazemore* that perpetuation of discrimination committed by an employer before the effective date of Title VII is itself a violation of Title VII. *Bazemore,* 478 U.S. at 397, 106 S.Ct. at 3007. As the Court there indicated: "Each week's paycheck that delivers less to a [woman] than to a similarly situated [man] is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Id.* at 395-96, 106 S.Ct. at 3006. Here, the plaintiffs attempted to demonstrate that the County perpetuated its discriminatory activity beyond the effective date of Title VII—and, indeed, through the time of this litigation.

The court concludes that the plaintiffs have failed to establish Title VII liability under *Gunther.* As indicated above in the findings of fact, the plaintiffs failed to establish that the County had at all departed from its wage-setting methodology. The studies by Dr. Treiman on this question—the "graduate student" exercise and the "training and experience" exercise—are without any weight. Similarly, the ambitious attempt of the plaintiffs to prove selective departures from the Cresap procedures through Exhibit 616-A failed entirely. Exhibit 616-A and the analysis of it by Dr. Treiman do not reveal discrimination by the County during the Cresap process. It follows then, that the plaintiffs have not established the liability of the defendants under *Bazemore:* Without an

initial violation of Title VII, the mere perpetuation of the basic Cresap process does not demonstrate discrimination. Finally, as indicated above, the manner in which the County has responded to requests for upgrades in male-dominated and in female-dominated positions does not even begin to suggest that men and women have been treated differently—much less that they have been treated differently *because* they are men or women. The plaintiffs have thus failed to show by a preponderance of the evidence that the County has intentionally discriminated against women in female-dominated job titles either through the Cresap process itself or through the perpetuation of the Cresap process.

[5] Notwithstanding that after trial the plaintiffs sought to narrow their theory of liability to that of *Gunther* and of *Bazemore*, they introduced other evidence to show sex discrimination in the Nassau County compensation system. Thus, quite apart from the Cresap process, the plaintiffs demonstrated intentional discrimination against those women employed as police detention aides; the plaintiffs also introduced evidence of a sexist animus by several County officials. However, discrimination against police detention aides—even considered with the sexist remarks by County officials—does not constitute discrimination against women in female-dominated job titles generally: "Isolated" or "sporadic" occurrences of discrimination do not form a predicate for class relief under Title VII. *International Brotherhood of Teamsters*, 431 U.S. at 336, 97 S.Ct. at 1855; see also *Ste. Marie v. Eastern Railroad Association*, 650 F.2d 395, 405-06 (2d Cir.1981). The plaintiffs themselves recognized this to the extent they sought relief for police detention aides independently of their broader class claims.

[6] The plaintiffs also presented the report and the testimony of Dr. Michelson to the effect that there is a sex-based differential in the current salaries of male-dominated jobs and of female-dominated jobs. There can be no doubt that statistical reports such as the multiple regression analysis of Dr. Michelson may be relevant to a plaintiff's Title VII case. *Bazemore,* 478 U.S. at 400, 106 S.Ct. at 3008. As one court has characterized such proof:

> Multiple regression analysis is a relatively sophisticated means of determining the effects that any number of different factors [such as seniority, job duties, or sex] have on a particular variable [such as salary]; ... it may be the best, if not the only, means of proving classwide discrimination with respect to compensation in a case ... where a number of factors operate simultaneously to influence salary....

Wilkins v. University of Houston, 654 F.2d 388, 403 (5th Cir.1981).

Nonetheless, statistical proof "is subject to misuse and must be employed with care." *Id.* "[T]ypical examples" of weaknesses in statistical studies may include "small or incomplete data sets and inadequate statistical techniques." *Watson v. Forth Worth Bank & Trust,* 487 U.S. 977, 996-97, 108 S.Ct. 2777, 2790, 101 L.Ed.2d 827 (1988). Furthermore, "the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be...." *Bazemore,* 478 U.S. at 400, 106 S.Ct. at 3008. The Second Circuit has cautioned, however, that a defendant may not simply identify speculative or theoretical shortcomings of

a particular statistical report: "We read *Bazemore* to require a defendant challenging the validity of a multiple regression analysis to make a showing that the factors it contends ought to have been included would weaken the showing of a salary disparity made by the analysis." *Sobel v. Yeshiva University,* 839 F.2d 18, 34 (2d Cir.1988), *cert. denied,* 490 U.S. 1105, 109 S.Ct. 3154, 104 L.Ed.2d 1018 (1989); compare with *Bazemore,* 478 U.S. at 400, 106 S.Ct. at 3008 ("Importantly, it is clear that a regression analysis that includes less than 'all measurable variables' may serve to prove a plaintiff's case."). Furthermore, any variables suggested by the defendant to have been improperly omitted and demonstrated to have an effect on a multiple regression analysis must also be shown to constitute "actual determinants of salary." *Sobel,* 839 F.2d at 35; compare with *Bazemore,* 478 U.S. at 398, 106 S.Ct. at 3007 ("Petitioners selected these variables based on discovery testimony ... that four factors were determinative of salary: education, tenure, job title, and job performance.").

Finally as to statistical proof, the defendants have attempted to make much of the statement of the Ninth Circuit that "job evaluation studies and comparable worth statistics alone are insufficient to establish the requisite inference of discriminatory motive critical to the disparate treatment theory." *AFSCME v. State of Washington,* 770 F.2d at 1407; see also *UAW v. State of Michigan,* 886 F.2d at 769. Although the court agrees that the "weight to be accorded such *AFSCME v. State of Washington,* 770 F.2d at 1407, the court notes that the plaintiffs did not present Dr. Michelson's proof in order to show that jobs of "comparable worth" were paid different salaries by Nassau County. Rather, the plaintiffs undertook to show that there is a measurable disparity in the salaries of

female-dominated job titles and of male-dominated job titles and that this disparity could not entirely be accounted for by the four salary determinants of the Cresap process. That is, the plaintiffs attempted to show through Dr. Michelson that the variables yielded by a coding of Nassau County job descriptions could not "explain away" an apparent sex-linked compensation gap. Dr. Michelson did not try to arrive at an inchoate comparison of various Nassau County jobs—such as would be the objective of "comparable worth statistics"; rather, he tried to analyze the actual evaluative procedures used by the County to set salary grades. Accordingly, the attempts of the defendants to dismiss this case on terminology alone—that is, to dismiss this case as nothing more than a "comparable worth" case—are misguided.

Nonetheless, as indicated in its findings of fact, the court does not find that Dr. Michelson's testimony—either alone or as "corroborated" by the plaintiffs' other items of proof—supports an inference of intentional discrimination. Dr. Michelson's study was incomplete and predicated on highly questionable procedures. Furthermore, his study of current salary disparities omitted a critical factor—the labor market. The defendants demonstrated both that the market has a significant influence on current salaries in the County and that the introduction of a market variable reduced the apparent sex-related disparity to statistical insignificance. Thus, it is on the basis of the grave shortcomings in Dr. Michelson's study—not on the "comparable worth" characterization of the defendants—that the court concludes that the plaintiffs' statistical evidence fails to demonstrate even indirectly any intentional discrimination by the County.

The defendants are correct to argue that their reliance on the market in their compensation system does not give rise to Title VII liability. *AFSCME v. State of Washington,* 770 F.2d at 1407; see also *UAW v. State of Michigan,* 886 F.2d at 769. As stated above, the court does not find that the County relied on the market in the setting of salary grades for individual jobs during the Cresap process; however, the court does find that salary decisions since 1967—that is, decisions to upgrade or not to upgrade, decisions as to "across-the-board" pay increases, decisions as to "above-step" hiring and as to mass promotions of employees—have all been predicated in substantial part on the market. The market has animated every aspect of the County compensation system since 1967. Thus, to this extent—and to the extent demonstrated by Dr. Haworth in her report—the court finds that the plaintiffs have failed to demonstrate current Title VII sex discrimination by the County.

[7] Finally, the fact that the County has negotiated in good faith with CSEA as to salaries for County job titles undermines any possible discriminatory intent by the defendants. *Forsberg v. Pacific Northwest Bell Telephone Co.,* 840 F.2d 1409, 1419 (9th Cir.1988); see also *UAW v. State of Michigan,* 886 F.2d at 770 (granting of collective bargaining "inconsistent with an intent to discriminate against women in predominantly female classes"). Similarly, had the defendants demonstrated the existence of a bona fide and effective affirmative action plan, that too would have weighed in their favor. *Woodbury v. New York City Transit Authority,* 832 F.2d 764, 772 (2d Cir.1987); *Coser,* 739 F.2d at 751. As it is, the characteristics of the County programs on affirmative action do not either support or controvert the plaintiffs' allegations.

B. Conclusions

On the basis of all facts as so found and on the basis of the governing law as applied to those facts, the court concludes that the plaintiffs have not proven by a preponderance of the evidence that the defendants have intentionally discriminated against the members of the plaintiff class—that is, all women who have worked in female-dominated Nassau County civil service jobs since July 28, 1982. Indeed, the only evidence adduced by the plaintiffs that is probative of their claims—the intentional wage discrimination against police detention aides and the isolated instances of sexist remarks by three County officials—does not without more establish a pattern and practice of intentional discrimination by the County. The court thus concludes that the plaintiffs have not proven by a preponderance of the evidence that the defendants have violated Title VII of the Civil Rights Act of 1964 with respect to the class as a whole.

II. Equal Pay Act and Related Title VII Claims

[8] Section 206(d)(1) of Title 29 of the United States Code provides in relevant part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are

> performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex....

Thus, the Equal Pay Act mandates "equal pay for equal work" with respect to the male and female employees of an employer who work in "any establishment" of that employer. The defendant in an Equal Pay Act case has the burden of showing that any unequal pay is predicated on a legitimate factor that is not sex-related—such as seniority, merit, or quantity of production. *Corning Glass Works v. Brennan,* 417 U.S. 188, 196-97, 94 S.Ct. 2223, 2229-2230, 41 L.Ed.2d 1 (1974); *EEOC v. Madison Community Unit School District No. 12,* 818 F.2d 577, 588 (7th Cir.1987).

[9] Generally, a violation of the Equal Pay Act generally constitutes as well a violation of Title VII under a disparate treatment theory. *AFSCME v. County of Nassau,* 609 F.Supp. at 708-09. However, as indicated above, a Title VII violation is predicated upon proof of discriminatory intent—an element plainly not required by Section 206(d)(1). Nonetheless, such discriminatory intent may be inferred when an employer fails to explain a demonstrated inequality of pay for equal work. See, e.g., 29 C.F.R. § 1620.27 (proof of violation of Equal Pay Act constitutes proof of violation of Title VII); cf. *Brennan v. Prince William Hospital Corp.,* 503 F.2d 282, 286 (4th Cir.1974), *cert. denied,* 420 U.S. 972, 95 S.Ct. 1392, 43 L.Ed.2d 652 (1975).

[10] "Equal" jobs under Section 206(d)(1) need not be rigorously identical; rather, the plaintiffs must demonstrate that two jobs are " 'substantially equal' " as to the requisite " 'skill, effort, and responsibility.' " *Usery v. Columbia University,* 568 F.2d 953, 958 (2d Cir.1977) (citing *Hodgson v. Corning Glass Works,* 474 F.2d 226, 234 (2d Cir.1973), aff'd, 417 U.S. 188, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974)). "Skill" denotes the experience, training, education, and ability required in the performance of a job. See 29 C.F.R. § 1620.15(a). "Effort" is the necessary physical or mental exertion, 29 C.F.R. § 1620.16(a); "responsibility" denotes accountability, 29 C.F.R. § 1620.17(a); and "working conditions" include surroundings and hazards, 29 C.F.R. §§ 1620.18(a). These determinations are to be made on the basis of "actual job performance and content—not job titles, classifications or descriptions...." *Gunther v. County of Washington,* 623 F.2d 1303, 1309 (9th Cir.1979), *aff'd,* 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981). See also Marshall v. Building Maintenance Corp., 587 F.2d 567, 570-71 (2d Cir.1978). Again, the analysis conducted by a court under the Equal Pay Act is similar to that conducted under Title VII. *AFSCME v. County of Nassau,* 609 F.Supp. at 708.

[11] With respect to the job titles of police communications operator and of fire communications technician, the court notes first that the only Equal Pay Act plaintiff in the job title of police communications operator performs for the most part the work of a clerk typist. Accordingly, a comparison of her "actual job performance and conduct" to those of fire communications technicians does not establish a violation of the Equal Pay Act.

[12] Moreover, even as to police communications operators generally, this court has found that the positions are not "substantially similar" as to the requisite skill and responsibility. Accordingly, the evidence presented by the plaintiffs as to these positions does not support a finding of a violation of Title VII through the standards of the Equal Pay Act. Fire communications technicians are required to have five years of experience as volunteer fire fighters in Nassau County—experience that ensures they will have thorough knowledge of fire fighting techniques, equipment, and procedures. By contrast, police communications technicians are only required to have two years of experience in radio or telephone communications—experience that ensures that they will be skilled with receiving and transmitting information through the means used by the police department. And these differences of skill and of experience reflect differences in responsibility in the job itself: Police communications operators facilitate the communication of information between the public and the police; fire communications technicians perform an analogous task as to the fire department, but they also provide extensive services in the coordination of fire fighting efforts by the 71 different volunteer fire departments in Nassau County. That is, fire communications technicians provide as fighters as they do communication; police communications operators simply receive and transmit information. For these reasons, the court finds that the standards of the Equal Pay Act have not been violated with respect to the job titles of police communications operator and of fire communications technician; accordingly, the court also finds that the plaintiffs have failed to establish

a violation of Title VII with respect to the police communications operators.

[13] Second, as to the job titles of police detention aides and police officers serving as turnkeys, none of the police detention aides have agreed to prosecute this claim under the Equal Pay Act. See Plaintiffs' Post-Trial Brief at 51 n. 76. Nonetheless, the plaintiffs have shown a violation of Title VII by means of the proof initially adduced to demonstrate a violation of the Equal Pay Act. The skill actually required by these jobs is similar: Both police detention aides and turnkeys must have the ability to handle, to supervise, and to transport arrestees. The fact that the turnkeys—as police officers—must have more education than police detention aides and must be able to use a gun is plainly irrelevant for the actual requirements of their job as turnkeys. The effort and the responsibility of these different titles is also the same: Both police detention aides and turnkeys must perform the same duties with respect to detainees, and both have the same degree of accountability. Indeed, the *only* differences between the two positions is that the police detention aides are responsible for female detainees and the police officer turnkeys are responsible for male detainees.

Furthermore, as found above, the difference in salaries between these two positions is plainly attributable to intentional discrimination. When the job of police detention aide was created (as "police detention matron"), it was a title restricted only to women. Since then, the County has refused to upgrade the position to reflect the parallel duties of police detention aides and of turnkeys. At the time of this trial, every police detention aide employed by the County was female, and

every police officer turnkey was male. In short, it is clear that the County has maintained a significant disparity between the compensation for police detention aides and the compensation for police officer turnkeys precisely because the incumbents of the former title are women. The plaintiffs have demonstrated this violation of Title VII by a preponderance of the evidence.

Finally, as to the clerical workers at the Nassau County Detention Center, no plaintiff pursues a claim under the Equal Pay Act, and the plaintiffs have not prove that is necessary to show a violation of Title VII. The entirety of their proof on this matter rested on the fact that certain corrections officers perform clerical duties. But the court has found that those officers also have inmate-related responsibilities—such as photographing, fingerprinting, and supervising—that are not shared by the strictly clerical employees. The jobs are therefore not "substantially similar" with respect to skills or to responsibilities; further, the plaintiffs adduced no evidence of intentional discrimination in this regard. Accordingly, the court finds that the plaintiffs have failed to prove their allegations as to these jobs by a preponderance of the evidence.

CONCLUSION

The court has expressed its assessment of the worth of the reports and of the testimony of the plaintiffs' experts. Several other observations in that regard are, perhaps, peculiarly warranted by this case. An exercise of restraint discourages comment upon the extent to which this litigation exacerbated the emotional involvement of the individually named parties and members of the class in this lawsuit; the extent to which

expectations of financial rewards were encouraged and subsequently dashed; the extent to which anxieties were caused by the specter of financial liability; the extent to which enormous expenditures of money and energy were devoted to the prosecution and defense of this lawsuit—possibly at a cost to other, if not higher, values. Comment will be made only upon the expert witnesses without whose testimony litigation such as this cannot succeed.

The testimony of the plaintiffs' experts and the reports they prepared were not the proffers of detached scholars in the fields of economics, statistics, and sociology who were motivated by the sole purpose of assisting the finder of facts with an objective evaluation of the relevant data; rather, they were the proffers of partisans. When expert witnesses become partisans, objectivity and scholarship are sacrificed to the need to prevail. Testimony which is prompted by that need and by that goal may deprive worthy plaintiffs of the relief that may properly be due them, or it may wreak havoc upon the reputation and the financial condition of defendants. A ready solution for the prevention or minimization of such abuses is not at hand. It may be that the only remedy is the vigorous and incisive cross-examination of experts which Wigmore characterized as "beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 Wigmore, Evidence § 1367 (Chadbourn rev. 1974).

For all the reasons set forth in the findings of fact and in the conclusions of law, the court finds that the plaintiffs have established by a preponderance of the evidence their Title VII claim of discrimination in compensation as to those members of the plaintiff class employed as police detention aides; the

court finds that the plaintiffs have not established any of their other claims under Title VII and under the Equal Pay Act by a preponderance of the evidence.

SO ORDERED.

Supreme Court, U.S.
FILED
JAN 27 1997
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No. 96-1047

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

COUNTY OF NASSAU; Nassau County Executive; Nassau County Comptroller; Nassau County Board of Supervisors; Nassau County Civil Service Commission,

Petitioners,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO (AFSCME), et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

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BRIEF OF RESPONDENTS IN OPPOSITION

Respondents American Federation of State, County, and Municipal Employees, AFL-CIO and the plaintiff class of individual employees (collectively, "AFSCME") submit this brief in opposition to the petition for a writ of certiorari filed by the County of Nassau, New York and various county officials (collectively, "the County"). The County seeks review of a

unanimous decision of the United States Court of Appeals for the Second Circuit holding that the County was not entitled to an award of attorney's fees and expert witnesses fees as the prevailing defendant in an employment discrimination action brought by AFSCME. The petition is entirely meritless and should be denied.

STATEMENT

In 1983, respondent AFSCME, which represents many Nassau County employees, conducted a comprehensive study of the County's compensation system. The study revealed a pattern of pay disparities between male-dominated and female-dominated jobs that could not be squared with the County's published criteria for assigning wages to particular jobs. AFSCME and several other plaintiffs filed this action a year later, alleging that the County had intentionally discriminated in setting wages for jobs performed primarily by women.

The County claimed at the time that the salary grades it had assigned to various job titles were based on criteria developed and applied during a 1967 review of the County's compensation system by the consulting firm Cresap, McCormick and Paget. See Pet. App. A7-A8, A62-A75. The Cresap review resulted in an entirely new set of job titles and job descriptions, with salary grades assigned based on four factors: (1) knowledge and skills required for the job; (2) complexity and variety of duties required; (3) responsibility for independent action; and (4) supervisory responsibility. See Pet. App. A7. Plaintiffs claimed, however, that the pay disparity between predominantly female and predominantly male jobs, which emerged in 1967 and persisted until the time of suit, could not be explained by reference to these factors. They also asserted that women in a few specific job titles were doing the same work as men assigned to higher-paid titles.

The County moved to dismiss the complaint for failure to state a claim, but the district court held that "as a matter of law, [plaintiffs had] state[d] claims for intentional discrimination under the disparate treatment theory of Title VII." AFSCME v. County of Nassau, 609 F. Supp. 695, 711 (E.D.N.Y. 1985). Two years later, the court certified a class of all women who, since July 28, 1982, had worked in county jobs that had 70 percent or more female incumbents. AFSCME v. County of Nassau, 664 F. Supp. 64 (E.D.N.Y. 1987).

In a 16-day trial in 1989-1990, respondents attempted to show that jobs performed mainly by women were intentionally given pay grades lower than they would have received based on a neutral application of the County's own wage-setting criteria. See Pet. App. A154-A161 (district court opinion summarizing caselaw supporting such Title VII claims). Plaintiffs relied primarily on the testimony of two expert witnesses. See Pet. App. A10-A12. Dr. Stephan Michelson, an experienced labor economist, see Pl. Ex. 1056, conducted a major statistical study of wages in Nassau County, which averaged about $8000 higher for employees in male-dominated job titles than for employees in female-dominated job titles. Using statistical regression techniques, Michelson sought to determine how much of the differential could be explained by 78 gender-neutral variables reflecting various job characteristics. Michelson concluded that, while these other variables explained some of the apparently gender-based pay disparity, there remained a gap of about $3000 -- or approximately two salary grades -- between the salaries of equivalent male- and female-dominated jobs. See Pet. App. A118.

Plaintiffs' other expert was Donald Treiman, a professor of sociology at UCLA and a leading expert on pay equity for women. Pl. Ex. 1073. Treiman studied the 1967 Cresap job evaluation process, using several different methodologies. First, Treiman looked at the salary grades assigned by Cresap in 1967 to male- and female-dominated jobs with respect to (1) the years of training and experience required and (2) whether they involved supervision of others. Second, Treiman's research team applied the Cresap four-factor point system using the original Cresap descriptions of several hundred jobs. The results of Treiman's studies were very consistent: on average, the actual grades given to female-dominated jobs in 1967 were 2-3 salary grades lower than the grades given to other jobs that had the same training and experience/supervisory requirements or had been rated as equivalent by the graduate students. See Pl. Ex. 1074 at 13, 16.

Finally, Dr. Treiman undertook a statistical analysis of the point scores for jobs listed on plaintiffs' Exhibit 616 -- a document that was generated during the Cresap job-evaluation process in the 1960s and was identified at trial by one of the participants in the Cresap process as reflecting the actual conclusions reached by the Cresap team about the application of the point factors to each job title. Nov. 29, 1989 Trial Tr. at 356. Dr. Treiman converted the points on exhibit 616 to grades and compared the results with the actual grades assigned in 1967. He found that the actual grades assigned were much more favorable to male-dominated jobs. As a result, the average grade differential between female-dominated and other jobs with equivalent training and experience requirements and supervisory duties increased by approximately 1.6 salary grades. See Pl. Ex. 1075 at 6. In sum, Dr. Treiman's three studies of the Cresap process corresponded closely to Dr. Michelson's

extensive analysis of current salaries, with both experts testifying that there was a pay differential between predominantly female jobs and predominantly male jobs, in the range of 1.5 to 2.5 salary grades, that (1) could not be explained by job characteristics and (2) apparently had its origin in the discriminatory application of the Cresap criteria for setting pay based on job characteristics.

The defendants countered this evidence with two expert witnesses of their own. See Pet. App. A12. These experts, while raising some questions about the Treiman and Michelson methodologies, never disputed the fact that, if one looked only at the intrinsic characteristics of jobs, female-dominated jobs in Nassau County were not paid on the same basis as male-dominated jobs. Indeed, their own rating system supported the conclusion that all-female jobs in Nassau County were paid on average $1900 less than otherwise equivalent all-male jobs. See Def. Ex. GGG-1, Table 14. See also id. Table 13; Def. Ex. KKK-12. These experts testified, however, that this differential would be explained by reference to the outside labor market.

In addition to the expert testimony summarized above, the evidence at trial focused on (1) the details of the Cresap process, (2) the County's wage-setting criteria and responsiveness to market forces in the years after the Cresap study, and (3) the County's past history of segregating some jobs by gender and the adequacy of its affirmative efforts to integrate its work force. Plaintiffs also presented evidence concerning the equal pay claims, attempting to show that female employees in several job titles did essentially the same work as male employees in higher-paid titles.

In 1992, the district court issued a lengthy opinion, ruling for the defendants on the broad pay-equity claim and on all of the equal pay claims except one -- involving female "police detention aides" and male police officer turnkeys. See Pet. App. A55. The court did not question plaintiffs' legal theory, and was at times critical of the defenses mounted by Nassau County, but it reserved its strongest criticism for plaintiffs' expert witnesses -- labelling them, at various points, as "evasive" and as "partisans." It found methodological flaws in Dr. Treiman's "training and experience" and "graduate student" studies that, in its view, rendered them unreliable. Pet. App. A77-A92.[1] With respect to Dr. Treiman's analysis of Exhibit 616, the court refused to credit the testimony at trial that this document reflected the results of the point evaluation of jobs in the Cresap process. Pet. App. A99. The court also expressed serious reservations about the methods used by Dr. Treiman to select data from this document, concluding that these methods were so deficient that they fatally undercut his analysis.[2]

With respect to Dr. Michelson's work, the court noted a

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[1]The court simultaneously saw *no* basis for relying on defendants' expert's responses to these Treiman studies -- *i.e.*, the analyses where he took versions of Dr. Treiman's regression equations and added variables supposedly representing the market or hours worked. Pet. App. A90-A91. It pointed out that there was no evidence that these factors played any role in the Cresap process. Id.

[2]Here again, however, the court gave little or no credence to defendants' experts' responses to the Exhibit 616 study, which had attempted to explain the grade changes at issue by reference to "market" data and the pre-Cresap grades of jobs. The problem, once more, was the complete absence of evidence that anyone in 1967 actually relied on such factors in adjusting grades. See AFSCME v. County of Nassau, 799 F. Supp. 1370, 1391 (A75).

variety of concerns, but gave primary emphasis to Dr. Michelson's failure to include in his analyses a variable or variables reflecting the "market" wage for each job. However, the court elsewhere noted the absence of evidence that the market played any role in the actual Cresap process on which the County's salary grades were based. Pet. App. A90-A91 ("the court is unable to conclude that the Cresap team actually considered market data in setting individual salary grades"); Pet. App. A106 (finding "no satisfactory basis on which to conclude that the Cresap process entailed the use of labor market data to set specific salary grades").

Turning to the non-statistical evidence, the court found that Nassau County's work force was in fact highly sex-segregated but that formal barriers to integration had been eliminated by the 1970s and that the "better explanation" for the current situation is that men and women prefer different jobs. Pet. App. A139.

Thus, while acknowledging that plaintiffs had articulated a legally valid claim, the trial court held that they had not presented sufficient evidence to carry their burden of proof with respect to the broad claim of discrimination against all workers in predominantly female job titles. The court did, however, rule that plaintiffs had proved intentional discrimination based on gender with respect to one job title. It held that the duties of employees in the entirely female job title of police detention aide and the duties of male police officers assigned as "turnkeys" were substantially similar and that the salary disparity between these two groups is plainly attributable to intentional discrimination. Pet. App. A167. This ruling led to the award of more than $1.6 million to 17 women who have served as police detention aides. Pet. App. A24.

Defendants moved for an award of attorneys fees and costs, arguing that, as of the time the case was *ready for trial*,

plaintiffs should have known their claims lacked merit and should not have proceeded further. On this basis, defendants argued that they had satisfied the standard for fee awards to Title VII defendants set forth in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), requiring, as a predicate for any fee award to a prevailing defendant, a finding that the case was "frivolous, unreasonable, or groundless."

In 1993, the district court granted defendants' motion. Pet. App. A37. In its opinion, the court began with a critique of the Christiansburg standard, suggesting that the Supreme Court had departed from the "plain meaning of the statute derived from the unambiguous words" when it "engrafted" on the statute a distinction between prevailing civil rights plaintiffs and prevailing defendants. See Pet. App. A40-A43. The court then proceeded to quote at length from its own prior critique of plaintiffs' experts and concluded that, overall, plaintiffs' evidence "fell considerably short of the mark." Pet. App. A47.

In determining whether the case was "frivolous" under Christiansburg, the court drew a distinction between (1) a case brought by a "modestly salaried employee or group of employees" against a wealthy defendant, and (2) this case, involving a major union which invested in costly expert studies and had "very able and experienced counsel." Pet. App. A49. Then, recognizing its obligation to avoid "post hoc reasoning" in the application of the Christiansburg standard, the court nevertheless stated that it was necessary to base its ruling on a "kaleidoscopic view of the entire case which was possible only from the vantage point of time." Pet. App. A51. From that vantage point, the court concluded that a fee award would serve the purposes of the statute, and awarded the $982,407.23 in attorneys fees requested by the defendants, covering all of their

work since the complaint was filed in 1984, including work on the police defendant aides claims on which plaintiffs had prevailed.

The court deferred decision on the issue of expert fees in 1993, because the only basis for an award of expert fees was section 113 of the Civil Rights Act of 1991, the applicability of which to cases arising before 1991 was then before this Court. Subsequently, in Landgraf v. USI Film Prods., 511 U.S. 244 (1994), this Court held that other key provisions of the 1991 Act apply only prospectively. Nevertheless, on May 31, 1995, the court issued an order distinguishing Landgraf and applying section 113 of the Act retroactively so as to entitle defendants to an additional award of $550,974.66 in expert fees. Pet. App. A26-A27.

The Second Circuit unanimously reversed the district court's awards of attorney's and expert fees against respondents. The court of appeals first noted that respondents had "established a prima facie case of gender-based pay discrimination by introducing statistics tending to show an unexplained differential in wages," Pet. App. A19 (citing, inter alia, Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 306-08 (1977)), and observed that defendant's expert had conceded that there was indeed "a gap between the salaries of men and women in Nassau County that is not explained by job specifications alone." Pet. App. A20 (quoting district court). The court of appeals held that the trial judge had erred by designating plaintiffs' presentation of a prima facie case of discrimination as "meaningless" for purposes of the Christiansburg inquiry. Pet. App. A20 (quoting district court). Pet. App. A20-A21. The court also observed that the trial court's denial of the County's motion to dismiss and later its motion for a directed verdict were "in some tension" with the

court's finding that plaintiffs' claims were frivolous. Pet. App. A25 n.2.

The court of appeals held that plaintiffs had introduced sufficient evidence on their claims of intentional discrimination to defeat the conclusion that the claims were frivolous, unreasonable, or groundless under Christiansburg. Noting that establishing intent "is difficult in any case," the court observed that plaintiffs' experts had tried to show that the undisputed disparity between male- and female-dominated jobs was the result of discrimination. The court noted that the district court's negative assessment of plaintiffs' expert testimony depended heavily on credibility determinations and on "the counterweight of the County's experts and studies," factors that plaintiffs "cannot be required to have anticipated ... prior to trial." Pet. App. A22. Furthermore, there was no evidence, and the district court had not found, that AFSCME had "'continued to litigate'" initially meritorious claims after those claims 'clearly became' frivolous. Pet. App. A22 (quoting Hughes v. Rowe, 449 U.S. 5, 15 (1980) (quoting in turn Christiansburg, 434 U.S. at 422)).

Turning to the substantiality of plaintiffs' case, the court observed that "a claim is not necessarily frivolous because a witness is disbelieved or an item of evidence is discounted, disproved or disregarded at trial." Pet. App. A23 (citations omitted). It noted that when evidence is introduced that would be sufficient to support a judgment for plaintiffs, a fee award is generally unjustified. Pet. App. A23 (citations omitted). Here, the court concluded, plaintiffs had "offered evidence as to each element" of their claim, and, had their evidence been credited by the district court, "could have prevailed" -- as the district court itself had recognized. Pet. App. A23-A24 (quoting district court's observation that only the work of "very able and experienced defense counsel" had prevented plaintiffs from winning at trial). In these circumstances, the Second Circuit

concluded, a fee award was not justified, at least "in the absence of intentional misleading by the plaintiffs." Pet. App. A24.

Finally, the court of appeals noted that the fact that plaintiffs had won a judgment for $1.6 million for the female police detention aides plaintiff undermined the district court's ruling. Pet. App. A24-A25. Observing that a frivolous claim might merit a fee award even if joined with meritorious ones, the court observed that "the claim on which AFSCME prevailed was closely related to its other claims, and it was substantial by most measures." Pet. App. A25. The court concluded that the award of fees was "unwarranted under the Christiansburg standard, and the district court therefore abused its discretion in granting fees" to defendants. Pet. App. A25.

Because it concluded that the County was not entitled to fees under Christiansburg, the court of appeals found it unnecessary to reach the question whether the expert fee provision of the Civil Rights Act of 1991 applies retroactively. Pet. App. A16. It also rejected without comment a cross-appeal in which the County sought reversal of the district court's award of attorney's fees in favor of AFSCME in connection with its successful "police detention aide" claim.

ARGUMENT

This petition presents no issue for Supreme Court review. The unanimous decision below involved nothing more than the straightforward application of the long-settled Christiansburg standard to the facts of this case. The court's decision that no fees could be assessed against plaintiffs here was obviously correct given the validity of the plaintiffs' legal theories, the extensive and substantial evidence they adduced at trial in support of those theories, and the fact that petitioners prevailed at trial on claims of discrimination for which the affected

plaintiffs were awarded over $1.6 million. The County understandably does not ask this Court to reconsider Christiansburg's settled construction of the Title VII fee-shifting provision, and its efforts to conjure up a dispute among the lower courts concerning the proper application of the Christiansburg test are wholly unpersuasive.

The other issue on which petitioners now seek review -- the "retroactivity" vel non of a provision of Section 113 of the Civil Rights Act of 1991 -- was not even passed upon in the court of appeals, and is likewise entirely unsuited for Supreme Court review.

I. THE DECISION BELOW INVOLVED THE APPLICATION OF SETTLED LAW TO PARTICULAR FACTS, WAS PLAINLY CORRECT, AND PRESENTS NO ISSUE WHATSOEVER CALLING FOR REVIEW BY THIS COURT.

The issue before the Second Circuit was whether the district court had abused its discretion in concluding that the well-known criteria for a defendant's fee award under Christiansburg had been satisfied here. There was no dispute between the parties about the nature of legal standard to be applied, which had been clearly set forth in Christiansburg and its progeny and in scores of decisions in the lower courts. All that was disputed below was whether the record supported the district court's conclusion that the Christiansburg prerequisites had in fact been satisfied in this case. This Court does not sit to review the application of settled law to particular facts.

The court of appeals thoroughly understood the applicable legal standards, see Pet. App. A16-A17 (discussing Christiansburg), and set forth in detail compelling reasons why

plaintiffs in this case could not be liable for fees under Christiansburg. Among other things, it observed that:

> AFSCME established a prima facie case of a violation of Title VII; introduced extensive statistical evidence through the testimony of two expert witnesses which, if credited, could have supported a judgment in its favor; and won $1.6 million on its claim that the County intentionally discriminated in paying police detention aides (predominantly women) less than turnkeys (predominantly men).

Pet. App. A6. The court of appeals did not "eschew inquiry," Pet. 11, into whether plaintiffs' continued pursuit of this litigation was unreasonable -- to the contrary, the court below expressly addressed that question and resolved it against the County. Pet. App. A20-A24. The court's conclusion that plaintiffs' evidence was *sufficient to support a judgment in their favor* (Pet. App. A23-A24) demonstrates, a fortiori, that it was reasonable for them to pursue their claims to judgment.

The court of appeals' reversal of the fee award against plaintiffs was obviously correct. In addition to all the reasons canvassed by the court of appeals, the district court (1) failed to explain how it could have been unreasonable ex ante for plaintiffs to regard Exhibit 616 as potential "smoking gun" evidence demonstrating that the County had purposely skewed the results of the Cresap evaluation to downgrade female-dominated jobs in relation to male-dominated ones, (2) assessed fees for the entire 7-year history of the litigation even though the County claimed only that plaintiffs' continued pursuit of the case, although initially reasonable, "became" unreasonable

at the time of trial, see, e.g., Pet. 9-10, 12;[3] (3) explicitly disavowed the Christiansburg Court's warning that courts must avoid "post hoc" analysis of plaintiffs' unsuccessful claims as "sterile" and expressly assumed the "vantage point of time" in assessing plaintiffs' claims; (4) concluded, unprecedentedly, that the Christiansburg test applies with more rigor when the Title VII plaintiff is a large organization; and (5) allowed defendants to recover fees for work relating to the police detention aide claims even though plaintiffs *prevailed* on these claims and were *themselves* awarded fees. In short, the district court's ruling was itself an egregious departure from Christiansburg, and it was quite properly reversed. Petitioners do not identify, and have never identified, a single case in which a fee award was upheld under Christiansburg in remotely similar circumstances. As the court of appeals observed, a plaintiff that introduces evidence sufficient to go to trial and to "support[] a judgment in its favor," Pet. App. A6; see id. at A21-A24, cannot be liable for fees under any reasonable understanding of Christiansburg.

Seeking to manufacture an issue of law in this factbound case, petitioners assert that the Second Circuit improperly "collapse[d] the three disjunctive criteria" established in Christiansburg -- by which respondents mean the Court's use of the phrase "frivolous, unreasonable, or without foundation," see 434 U.S. at 421 -- into a "single standard of frivolousness." See Pet. 5, 10. This argument is itself frivolous.

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[3]The County now suggests (Pet. 12) that it was not until the middle of trial, after the close of Dr. Treiman's testimony, that AFSCME should have perceived the hopelessness of their case and withdrawn its claims. This argument, which was not made in the court of appeals, only highlights the district court's error in assessing fees against plaintiffs.

The Second Circuit expressly applied the entire Christiansburg standard as written by this Court.[4] Nothing in its opinion in any way conflicts with the understanding of that standard expressed by this Court and other federal courts.[5] The claimed conflict is based on the notion that three terms used to characterize those rare cases where defendants are entitled to fees have different meanings and must be applied independently. But the Christiansburg Court itself used the terms "frivolous," "groundless," "without foundation," and "unreasonable" interchangeably, 434 U.S. at 421-24, and never suggested that there is some significant category of cases that qualify, for example, as "unreasonable" without being "frivolous" (or vice versa). The Court counselled common-sense application of these "abstract words" in "concrete cases," Christiansburg 434 U.S. at 421; its analysis did not suggest that it was creating a three-part test to be applied in some mechanical fashion. In sum, the County's quibble with the Second Circuit's diction presents no reason to grant certiorari.

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[4]See Pet. App. A6 ("that AFSCME's claims were not 'frivolous, unreasonable or groundless'") (quoting Christiansburg; emphasis added); Pet. App. A19 ("After reviewing all the circumstances of this case and the proof introduced at trial, taken together, we are persuaded that AFSCME's case was not 'frivolous, unreasonable, or without foundation' so as to permit an award of fees under Title VII.") (quoting Christiansburg) (emphasis added).

[5]Contrary to petitioners' suggestions (Pet. 11), the court below did not espouse some new standard that would effectively allow defendants' fee awards only in cases of bad faith. See, e.g., Pet. App. A17.

II. THE SECOND QUESTION PRESENTED, RELATING TO WHETHER SECTION 113 OF THE CIVIL RIGHTS ACT OF 1991 AUTHORIZES EXPERT FEE AWARDS IN CASES ARISING BEFORE ITS ENACTMENT, IS EQUALLY UNWORTHY OF THIS COURT'S CONSIDERATION.

The County also asks the Court to grant certiorari on the question "[w]hether section 113 of the Civil Rights Act of 1991, which allows a prevailing party to recover expert fees, may be applied in cases arising before its enactment." But the court of appeals did not even reach that question, see Pet. App. A16, and petitioners are unable to point to any court that has adopted their position. Indeed, there are almost no reported decisions on point.[6] As this paucity of caselaw suggests, the "retroactivity" of Section 113 is not an issue of wide-ranging importance. Furthermore, whatever importance that issue may have had is rapidly diminishing now that almost six years have elapsed since Section 113 became law. In short, petitioners' second question presented is as unworthy of review as their first.

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[6]Shipes v. Trinity Indus., 31 F.3d 347 (5th Cir. 1994), is the only post-Landgraf court of appeals decision on the applicability of Section 113 in cases arising before its enactment; citing Landgraf, the Fifth Circuit held Section 113 inapplicable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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